No. 20134

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

WASHINGTON STATE BOWLING PROPRIETORS ASSOCIATION, INC., a corporation, PIERCE-OLYMPIC BOWLING PROPRIETORS ASSOCIATION, INC., a corporation, TOWER LANES, INC., a corporation, BOWLERO, INC., a corporation, DAFFODIL BOWL, INC., a corporation, PARADISE BOWL, INC., a corporation, C. A. LOYD and JANE DOE LOYD, his wife, d/b/a SIXTH AVENUE LANES, THEODORE TADICH and JANE DOE TADICH, his wife, DEZ ISAACSON and JANE DOE ISAACSON, his wife, KENNETH KULM and JANE DOE KULM, his wife, PHILLIP CUNNINGHAM and JANE DOE CUNNINGHAM, his wife, CLEVE REDIG and JANE DOE REDIG, his wife, and ART UNKRUR and JANE DOE UNKRUR, his wife,

Appellants,

vs.

PACIFIC LANES, INC., a corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

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FRAYN PRINTING COMPANY SEATTLE, WASHINGTON

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BRIEF OF APPELLEE

NATURE OF THIS APPEAL

This is an appeal from a judgment for plaintiff (appellee in this Court) in an action for damages under the antitrust laws (15 U.S.C. §§ 1, 2, 15). The District Court had jurisdiction of the case under 15 U.S.C. § 15. This Court has jurisdiction to hear the appeal under 28 U.S.C. § 1291.

PARTIES

Pacific Lanes, Inc., appellee, owns and operates a bowling alley in Tacoma, Washington. R. 161. Charles Hoffman is president of the company and manages the business. Tr. 336-337. Appellants Washington State Bowling Proprietors Association, Inc. (WSBPA) and Pierce-Olympic Bowling Proprietors Association, Inc. (P-OBPA) are incorporated associations of bowling alley proprietors. R. 161. They are affiliated with Bowling Proprietors Association of America, Inc. (BPAA) a national association incorporated in Illinois and named as a co-conspirator in this case. R. 161, 171. The remaining defendants are four corporations and seven men and their wives who operate bowling alleys and belong to the defendant associations. R. 161-162. The fact that the acts found unlawful in the trial court arose from a concert of action among the defendants and others has not been contested.

ISSUES FRAMED BY THE PRETRIAL ORDER

The complaint originally filed alleged violations of both the Sherman Act and the Clayton Act, and named the BPAA as an additional defendant. R. 1-8. Service as to the BPAA was quashed (R. 20), it was thereafter named as a co-conspirator (R. 171), and only the Sherman Act violations were pursued.

Before trial, the parties presented an agreed pretrial order, which was signed by the District Judge. R. 160-187. The pretrial order superseded the pleadings, and controlled the subsequent course of the action. Rule 16, F. R. Civ. P.

The main issues were framed in the pretrial order by the following allegations of plaintiff (R. 165-174):

• That "at all times material to this case, the defendants, together with the Bowling Proprietors Association of America, Inc., and other persons and corporations, have been engaged in an unlawful combination and conspiracy which has extended throughout the United States, including Western Washington. The aims of this conspiracy have been to establish and impose unreasonable restrictions in the trade and commerce of bowling, to suppress and restrict competition in the bowling industry, to monopolize the industry and impose non-competitive conditions on it, and to discriminate against bowling establishments which are not members of the Bowling Proprietors Association of America, Inc., and its affiliated organizations such as the Washington State Bowling Proprietors Association, Inc. and Pierce-Olympic Bowling Proprietors Association, Inc."

• That "the said combination and conspiracy have consisted of a continuing agreement and concert of action by and between the defendants, and other parties, the substantial terms of which have been that the defendants agree:

"1. to conduct, sponsor and sanction bowling tournaments so as to make them open only to those persons who restrict, or who agree to restrict, their league bowling and tournament bowling entirely to establishments which are members of the three bowling proprietors associations, rejecting and declaring ineligible for the tournaments any bowler who does, or who has done, any organized bowling in an establishment not belonging to the association. These restrictions have been carried out by the adoption and enforcement of so called 'eligibility rules' . . . The intended and actual effect of the said agreements, rules and practices has been and is to deprive non-member establishments of the patronage of persons who wish to engage in organized bowling, to enforce a boycott against non-member establishments, and thereby to suppress competition and monopolize the bowling industry.

"2. To limit and restrict the number and size of bowling establishments by coercing and dissuading others from building or expanding such establishments, and by soliciting suppliers and manufacturers of bowling equipment, and other persons, not to deal with such persons . . .

"3. To fix and stabilize, insofar as possible, the prices charges for bowling, and to refrain from competing for the patronage of bowlers except as against non-member establishments.

"4. To regulate and control throughout the United States, including Western Washington, the number of bowling establishments, the size of bowling establishments, and the conditions under which bowling may be carried on, all for the purpose of monopolizing and eliminating competition in the bowling industry . . ."

• That "the conspiracy and combination of defendants and their co-conspirators have been in restraint of interstate commerce, and have affected interstate commerce, as to the flow of interstate shipments of equipment, goods and merchandise, equipment rental payments and other payments made across states lines, interstate travel in connection with bowling events, and the conduct of nationwide and multi-state bowling tournaments and events having substantial interstate commerce aspects as aforesaid . . ."

• That "as a direct and proximate result of the combination and conspiracy hereinabove alleged, plaintiff has been injured in its business to its damage, to date, in the amount of $50,000."

These allegations were denied by defendants, joining the issues for trial.

VERDICT AND JUDGMENT

The District Judge submitted special interrogatories to the jury. The jury answered them by specifically finding that all defendants had conspired to

restrain trade in violation of Sherman Act § 1; that all defendants had conspired or attempted to monopolize a part of commerce in violation of Sherman Act § 2; that defendants' unlawful acts had substantially affected the interstate commerce portion of plaintiff's business, and that the portion affected was neither insignificant nor insubstantial; that the unlawful acts also substantially affected other interstate commerce; that defendants' violations had caused financial loss to plaintiff's business; and that the amount of the loss was $35,000. R. 219-223.

After the verdict defendants moved for judgment n.o.v. or for a new trial. R. 227. The District Court filed a memorandum decision denying the motions. R. 232-248. For convenience, the District Court's decision is reproduced as Appendix D to this brief. Judgment was entered on the jury's verdict for $127,500 plus costs, the amount consisting of $105,000 as treble damages and $22,500 as attorney fees. R. 249-251.

SUMMARY OF EVIDENCE

Bowling is a substantial line of commerce. In 1962 revenues from the sale and lease of bowling equipment in the United States exceeded $300,000,000. R. 95. Yearly bowling alley receipts in Washington alone are about $13,500,000. Ex. 225.

Members of the BPAA and its affiliates own and operate about 80 per cent of all commercial bowling lanes in the country, and about 90 per cent in Washington. R. 114, Tr. 702. Membership in the associations is interlocked at all levels; to belong to the BPAA, a proprietor must also join the state and local affiliates, and *vice versa*. Tr. 130-31, Exs. 55, 130.

When the popularity of bowling increased in the 1950's following invention of automatic pinsetting machines, the associations and their members combined to keep newcomers out and monopolize the field. In 1957 the BPAA formed an "overbuilding committee". Ex. 1, Tr. 187-88. It asked the state associations to form "overbuilding committees" and many did. Ex. 6, Tr. 187-188. The committees brought pressure on equipment manufacturers not to supply would-be proprietors, threatened newcomers with non-membership in the association, and sought to "saturate" areas with lanes built by existing proprietors while telling others there was no room for new establishments. The overbuilding committees' effects in monopolizing and restraining commerce are summarized *infra*.

One aim of the "overbuilding" activities of defendants was price stabilization. Discussing the committee's work in 1959, the BPAA president said, "Once the price structure collapses we are all in trouble." Ex. 22. In Washington, applicants for membership were asked to bring their prices up to the level charged by members, and price schedules were arrived at in association meetings. Tr. 235, 422-29, 962, 1117-19, 1121.

Defendants used bowling tournaments to eliminate competition in the industry. Tournaments are valuable in producing revenue and stimulating interest. Ex. 227. They are an important inducement to people to engage in league bowling; and league bowling accounts for about half the industry's income. Tr. 143, R. 95. Defendants adopted "eligibility rules" which banned bowlers from tournaments unless they did *all* their league and tournament bowling in member establishments, and none in other houses. Both the BPAA and WSBPA enforced this

rule, with minor variations. Tr. 202-217, R. 163-4. The purpose of the "eligibility rule" was to injure independent competitors by forcing bowlers to boycott them as a condition of entering tournaments. The evidence proving this is summarized *infra*. Independent houses were forced into the association. One member testified he joined "Because we have no real alternative. We have to be a member in order to have bowlers. We have no choice." Tr. 752.

Initiation fees were high, often amounting to several thousand dollars, and some houses could not afford to join. Ex. 64, Tr. 802-803, Ex. 168, Tr. 791.

In 1963 the BPAA changed its eligibility rule to provide a bowler would be eligible if he bowled in one league in a member house; this was done "in keeping with the demands of the Federal Justice Department and many local and state antitrust laws . . ." Ex. 228. However, the WSBPA did not follow suit but provided that bowlers giving some business to a non-member house would be ineligible unless they applied specially for an "eligibility card." R. 165. The eligibility application form was so complicated that even the WSBPA president could not tell how to fill it out. Ex. 201, Tr. 382. Bowlers found the questionnaire impossible and gave up trying. Tr. 104-105, 503, 870, 885, 879. The few who persisted could not get forms, or could not get their cards in time. Ex. 167, Tr. 885, 783, 724, 650-52. As a result the new rule worked the same as the old one; at the time of trial only 30 eligibility cards had been furnished by defendants while thousands bowled in association-sanctioned tournaments. Tr. 1778. The overwhelming majority of bowlers continued to boycott independent houses.

In the WSBPA "Code of Ethics" members agreed

When the popularity of bowling increased in the 1950's following invention of automatic pinsetting machines, the associations and their members combined to keep newcomers out and monopolize the field. In 1957 the BPAA formed an "overbuilding committee". Ex. 1, Tr. 187-88. It asked the state associations to form "overbuilding committees" and many did. Ex. 6, Tr. 187-188. The committees brought pressure on equipment manufacturers not to supply would-be proprietors, threatened newcomers with non-membership in the association, and sought to "saturate" areas with lanes built by existing proprietors while telling others there was no room for new establishments. The overbuilding committees' effects in monopolizing and restraining commerce are summarized *infra*.

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In the WSBPA "Code of Ethics" members agreed

to reject from tournaments anyone who bowled in a league in a non-member house. Ex. 59. The Code was taken from the BPAA magazine. Exs. 192, 261g, Tr. 2417-2419. In 1963 the BPAA advised affiliates under the antitrust laws to take certain provisions out of their codes of ethics; WSBPA directed a committee to work on this, but the original code was still in effect at the time of trial. Exs. 188, 193, 214, Tr. 2421-25. The code also prohibited solicitation of customers from fellow members and the offering of special inducements to get business, and provided that violators could be suspended. Ex. 59.

The associations at all levels retained the power to discipline members by fine or expulsion. Tr. 132, 1654, Ex. 67.

In 1959 the WSBPA overbuilding committee told Hoffman they would not let him build Pacific Lanes. Tr. 574. Plaintiff built anyway and joined the association in the fall of 1959. In 1960 the P-OBPA charged plaintiff with accepting the business of two leagues without notifying the houses from which they were moving. Ex. 75. A "hearing" was held; Hoffman had 20 minutes advance notice, was not in the room when witnesses testified against him, and was not advised of any right to appeal. Tr. 2445-46. In practice the association ordinarily thought it sufficient if the league secretary notified the house from which the league was moving. Tr. 1034. This had been done by the secretaries when the two leagues in question decided to move to Pacific. Tr. 2188-9, 968, Ex. A-78. Nevertheless plaintiff was found guilty and sentenced to suspension for two years or a $1,000 fine. Ex. 92. In the face of this plaintiff resigned from the association. Tr. 582-3, 1126.

Pacific's bowlers remained eligible for tourna-

ments through the 1960-61 season. Ex. 98. Beginning in 1961-62 the rule was extensively enforced and plaintiff's bowlers were rejected from tournaments. Tr. 473-476, 482, 489-490, 500, 532-33, 559-60, 665-67, 675, 680-81, 685, 690, 778, 877, 993-5, 1021, 1028, 1039, 1070, 1073, 1079, 1754, 2351. Because of this plaintiff lost the business of leagues, teams, and individual bowlers each season to the time of trial. The evidence of damages is summarized *infra*.

SUMMARY OF ARGUMENT

Two features appear throughout appellants' brief: First, their arguments are mostly afterthoughts—issues which were not raised in the trial court and which cannot be raised for the first time on appeal. Second, they seek to re-argue disputed factual issues on which there was conflicting evidence and which were resolved against them by the jury's verdict. In both respects appellants seek to go beyond the bounds of appellate review.

The group boycott instruction given by the District Court was not excepted to by defendants. It is therefore the law of the case and cannot be attacked on appeal. The instruction was correct in any event in stating the rule that group boycotts (concerted refusals to deal with prospective customers) are illegal per se. The court did not instruct that the "eligibility rule" was an illegal boycott, although the evidence was overwhelming that it was. The one requested instruction to the refusal of which defendants excepted was not a correct statement of the law. There was no error on the boycott issue.

In any event, appellants' arguments about the boycott instructions all relate to the alleged violations of Sherman Act § 1. The jury also made a special finding that defendants committed the sep-

arate offense of conspiring or attempting to monopolize commerce in violation of Sherman Act § 2. This finding was supported by clear evidence of intent to monopolize coupled with actual control of 90 per cent of the industry. The special finding on Sherman Act § 2 independently sustains the verdict and moots the argument about the boycott instructions.

The court correctly submitted to the jury the damages issue for the three past bowling seasons 1961-62, 1962-63, and 1963-64. Although the complaint was filed in 1961, defendants before trial in 1964 stipulated to a pretrial order which framed the issues to include damages through the spring of 1964. The pretrial order superseded the pleadings and made it unnecessary to file a supplemental complaint before trial, which plaintiff otherwise could have done. Both sides prepared to try the damages issue through the 1963-64 season, and introduced proof of many events which occurred after 1961. Defendants did not except to the court's instruction submitting the damages issue from the time plaintiff left the association through the 1963-64 season.

Appellants seek to argue that the damages evidence was insufficient, but did not raise this issue in the trial court. Their motion for directed verdict was grounded solely on the claim that interstate commerce was not sufficiently involved. Appellants have disregarded Rule 50, F.R.Civ.P., and may not raise the damages question for the first time on appeal.

There was ample proof of the fact of damages in any event, and the jury's finding on amount of damages is supported both by the evidence of plaintiff's lost league income and approximate open play loss, and by comparison of plaintiff's revenues with those of its two most similar competitors.

The jury's special verdicts on interstate commerce were based on substantial evidence. Plaintiff's and other proprietors' interstate equipment rental payments were lowered by the conspiracy. The eligibiility rule reduced interstate travel of bowlers and imposed the qualitative restraint of limiting such travel to those who boycotted independent bowling houses. The conspirators' price stabilization scheme was effected through an interstate instrumentality, the BPAA. The overbuilding committees directly restrained commerce by blocking the sale and lease of equipment to would-be bowling proprietors. All of these activities were parts of defendants' conspiracy to restrain and monopolize the industry and administer it privately under non-competitive conditions.

THE GROUP BOYCOTT INSTRUCTIONS

(Answering Appellants' Point 1, Br. 45-46, 50-62)

No Proper Exception was Taken to the Group Boycott Instruction Given

Appellants' first specification of error begins with the words: "The boycott instructions given by the Court were erroneous." Br. 45. In the trial court appellants did not claim the boycott instruction *given* by the Court was wrong, and conceded it was a correct statement of the law. They argued only that it should have been "balanced" by additional instructions, and excepted only to the court's refusal to give one of their requests. As to the instruction given they have not complied with Rule 51, F.R.Civ.P.:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto . . . stating distinctly the matter

to which he objects and the grounds of his objection."

During trial the proposed group boycott instruction was discussed at a conference in chambers. Tr. 2023-2033. Defendants advised the court of their position on it as follows:

> "In other words, that this eligibility rule constitutes a boycott is the plaintiff's theory, *but we think there should be an instruction given with the boycott instruction* that would be on our theory that the rule is a legitimate, or rather, that the defendants have a right to pass rules for the regulation." (Emphasis added.) Tr. 2025.

After the charge was read to the jury appellants said "in the context given this is erroneous and misleading" but directed their exception to the absence of additional instructions:

> "Although these instructions on boycott articulate the plaintiff's theory, the court failed in any of the instructions to advise the jury as to the defendants' theory based upon Professor North's testimony that the purpose of the alleged rule is to recognize and promote competition." Tr. 2804.

Following the verdict, in arguing for a new trial, defendants still did not contend the group boycott instruction given was erroneous. Thus the District Court stated in its memorandum decision:

> "Regarding the group boycott instruction, the defendants do not contend that it is an incorrect statement of the law. The claimed error is that in failing to give requests 23, 27 and 29 the group boycott instruction by itself was 'misleading,' and its 'misleading' effect could only be overcome by 'balancing' with the defendants' request." R. 236, Appendix D, *infra*.

On appeal, appellants expressly conceded that the group boycott instruction given was correct, and assigned error only to the court's refusal to give certain requests. Point C in their statement of points filed pursuant to Rule 17 (6) of this Court reads:

> "C. *The court gave an instruction to the jury which adequately incorporated the rule that 'group boycotts' are per se violations of the anti-trust laws* and 'reasonableness' is no defense. However, the jury was not instructed that there are some acts in restraint of trade or with a monopolizing tendency that are permissible if they meet the test of reasonableness. Proposed Instructions No. 23, No. 27, and No. 29 were attempts by which appellants hoped to explain this to the jury. But the court refused to give them, and, thus, the jury was never instructed on the possible application of the rule of reason." (Emphasis added.) R. 260-261.

A party who does not except to an instruction given by trial court "stating distinctly the matter to which he objects and the grounds of his objection" has no standing to attack the instruction an appeal. *Sears v. Southern Pacific Co.,* 313 F.2d 498 (9th Cir. 1963); *Brown v. Chapman,* 304 F.2d 149 (9th Cir. 1962); *Hargrave v. Wellman,* 276 F.2d 948 (9th Cir. 1960); *Richfield Oil Corp. v. Karseal Corp.,* 271 F.2d 709 (9th Cir. 1959), cert. den., 361 U.S. 961, 4 L.Ed.2d 543.

One who merely objects to the *giving* of one instruction on the ground the court failed to give another *requested* instruction fails to preserve any claimed error for appeal as to the given instruction. *Richfield Oil Corp. v. Karseal Corp., supra* at 221-22. And one who merely objects to an instruction on the

ground that it is an incomplete statement of the law raises no appealable issue. *Boeing Airplane Co. v. O'Malley,* 329 F.2d 585 (8th Cir. 1964).

Here, defendants raised no issue as to the instruction given; it therefore became the law of the case and the yardstick for measuring the sufficiency of the evidence. *State Farm Mutual Auto. Ins. Co. v. Porter,* 186 F.2d 834, 845 (9th Cir. 1950).

The Boycott Instruction Was Correct

Group boycotts—concerted refusals by a group engaged in some line of business to deal with others outside the group, or to deal with others unless they in turn boycott the group's competitors—are illegal per se. They necessarily distort a free economy and transgress government's exclusive right to regulate commerce. In *Northern Pacific Ry. v. United States,* 356 U.S. 1, 2 L.Ed.2d 545 (1958) the Supreme court held:

> "... there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, *United States v.*

Socony-Vacuum Oil Co., 310 U.S. 150, 210 . . .; division of markets, *United States v. Addyston Pipe and Steel Co.*, 85 F. 271 . . ., aff'd., 175 U.S. 211 . . .; group boycotts, *Fashion Originators' Guild v. Federal Trade Com.*, 312 U.S. 457 . . .; and tying arrangements, *International Salt Co. v. United States*, *Id* at 5, 2 L.Ed.2d at 549-51, 332 U.S. 392 . . ."

Since a group which boycotts others is "an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, . . . [it] 'trenches upon the power of the national legislature and violates the statute'." *Fashion Originators' Guild, Inc. v. Federal Trade Comm'n.*, 312 U.S. 457, 465, 85 L.Ed. 949, 953 (1941).

Thus, concerted refusals to deal have been held unlawful in: *Montague & Co. v. Lowry*, 193 U.S. 38, 48 L.Ed. 608 (1904); *Loewe v. Lawler*, 209 U.S. 274, 52 L.Ed. 488 (1908); *Eastern States Retail Lumber Dealers' Ass'n. v. United States*, 234 U.S. 600, 58 L.Ed. 1490 (1914); *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 89 L.Ed. 951 (1945); *Fashion Originators' Guild, Inc. v. Federal Trade Comm'n*, 312 U.S. 468, 85 L.Ed. 949 (1941); *Keifer-Stewart Co. v. Jos. Seagram & Sons, Inc.*, 340 U.S. 211, 95 L.Ed. 219 (1951); *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 625, 97 L.Ed. 1277 (1953); *Radovich v. National Football League*, 352 U.S. 445, 1 L.Ed.2d 486 (1957); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 3 L.Ed.2d 741 (1959); *Radiant Burners, Inc. v. Peoples Gas, Light and Coke Co.*, 364 U.S. 656, 5 L.Ed.2d 358 (1961); *White Motor Co. v. United States*, 372 U.S. 253, 9 L.Ed.2d 738 (1963); *Silver v. New York Stock Exchange*, 373 U.S. 341, 347, 10 L.Ed.2d 389 (1963); *Standard Oil Co. of California v. Moore*, 251 F.2d 188 (9th Cir. 1957), cert. den., 356 U.S. 975, 2 L.Ed.2d

1148; *Jerrold Electronics Corp. v. Wescoast Broadcasting Co.,* 341 F.2d 653, 661 (9th Cir. 1965).

The illegality of group boycotts lies "not in the separate action of each, but in the conspiracy and combination of all, to prevent any of them from dealing with . . . [another]." *Binderup v. Pathe Exchange, Inc.,* 263 U.S. 291, 312, 68 L.Ed. 308, 317 (1923). Accord, *Kiefer-Stewart Co. v. Jos. Seagram & Sons, Inc. supra; Paramount Famous Lasky Corp. v. United States,* 282 U.S. 30, 41, 75 L.Ed. 145 (1930); *United States v. First National Pictures, Inc.,* 282 U.S. 44, 75 L.Ed. 151 (1930). The exclusion of others need not be absolute, *Montague & Co. v. Lowry,* 193 U.S. 38, 48 L.Ed. 608 (1904); *United States v. Terminal R. R. Ass'n,* 224 U.S. 383, 46 L.Ed. 810 (1912), and competition need not be wholly suppressed for the activity to be unlawful. *Paramount Famous Lasky Corp. v. United States, supra.*

Since concerted refusals to deal are unlawful regardless of the surrounding circumstances, the trial court may refuse to admit evidence of claimed reasonableness offered by defendants. *Fashion Originators' Guild, Inc. v. Federal Trade Comm'n, supra; Klor's, Inc. v. Broadway-Hale Stores, Inc. supra.*

Appellants here rely on two Ohio district court cases—*United States v. United States Trotting Ass'n,* 1960 Trade Cases, par. 69, 761 (S.D. Ohio 1960) and *United States v. Insurance Board of Cleveland,* 144 F.Supp. 684, 188 F.Supp. 949 (N.D. Ohio, 1956, 1960)—which they claim mean that group boycotts are illegal only if they involve "coercive action against parties outside the group." This proposition would conflict with the Supreme Court's ruling that a concerted refusal to deal is illegal because it "takes away the freedom of action of members," *Fashion Originators' Guild, Inc. v. Federal*

Trade Comm'n, supra, and restrains the freedom of the *parties to the boycott* independently to decide whether to deal with the boycotted party, *Kiefer-Stewart Co. v. Seagram & Sons, Inc.,* 340 U.S. 211, 213, 95 L.Ed. 219 (1951). *United States v. U.S. Trotting Ass'n* is not in point. The court there found the association was a non-commercial one open to anyone willing to pay the nominal dues; was a "service organization" which "does not participate directly in any phase of the commercial enterprises which have become associated with the sport;" and the eligibility requirement was a dead letter which had never been enforced. See 1960 Trade Cases, page 76,964.

It is not only the concerted refusal to deal with "other traders," as in *Klor's, Inc. v. Broadway-Hale Stores, Inc., supra,* which violate the Act. Concerted refusals to deal with potential *customers* are equally unlawful, as held by the Supreme Court in *Radiant Burners, Inc. v. Peoples Gas, Light and Coke Co.,* 364 U.S. 656, 35 L.Ed. 358 (1961) (refusal to provide gas to customers who used a certain manufacturer's gas burners not approved by the group) and recently by this Court in *Jerrold Electronics Corp. v. Wescoast Broadcasting Co.,* 341 F.2d. 653, 661 (9th Cir. 1965) (refusal to sell television broadcasting equipment to prospective customers).

Appellants seem to argue that group boycotts are permissible if the participants claim benign motives. This view conflicts with the Supreme Court's holding that they are illegal without inquiry as to the "harm they have caused or the business excuse for their use." *Northern Pacific Ry. v. United States, supra.* A refusal to deal stemming from non-economic motives is as illegal as any other. Thus in *Silver v. New York Stock Exchange, supra,* defend-

ants' refusal to supply wire service to plaintiff was motivated at least in part by the fact that the Defense Department had previously suspended plaintiff's security clearance. See 196 F.Supp. 209, 216-217, 226. Nevertheless the Supreme Court held the refusal an illegal group boycott. 373 U.S. at 347.

Even a claim that defendants acted to prevent the commission of torts by others cannot justify a concerted refusal to deal. In *Fashion Originators' Guild, Inc. v. Federal Trade Comm'n, supra,* the Supreme Court held:

> "Nor can the unlawful combination be justified upon the argument that systematic copying of dress designs is itself tortious. . . . [E]ven if copying were an acknowledged tort . . ., that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in volation of Federal Law." 312 U.S. at 468, 85 L.Ed. at 955.

Anyone injured by the boycott may maintain an action against the conspirators; the plaintiff need not be the one who was directly boycotted. *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., supra;* cf. *Walker Dist. Co. v. Lucky Lager Brewing Co.,* 323 F.2d 1 (9th Cir. 1963).

In the present case the trial court admitted defendants' evidence on the purpose of the eligibility rule, although it could have rejected it, *Fashion Originators' Guild, Inc. v. Federal Trade Comm'n, supra,* and instructed the jury on defendants' contentions about the purpose of the rule. Tr. 2742-43.

The boycott instruction clearly referred to boycotts in commerce:

> "For purposes of this case, a group boycott may be defined as the concerted refusal of a group of persons engaged in some *line of com-*

merce to deal with others—that is, to sell their *goods or services* to others—unless the potential *customers* agree that they will not do *business* with other firms which are competitors of the persons in the group. In other words, a group boycott is a combination of *business concerns* to boycott potential customers unless the customers restrict their *trade and custom* to the members of the group and avoid patronizing outside *competitors*.

"A group boycott is unlawful even though those who are parties to it claim that it was adopted for the purpose of eliminating practices thought by them to be *trade abuses* or *undesirable trade practices*." (Emphasis added.) Tr. 2773-74.

The court could have instructed that the eligibility rule was unlawful, but did not. Instead, it defined unlawful boycotts in general terms and left the issue to the jury. The instruction was clearly correct under all of the authorities in the field.

The Eligibility Rule Was an Unlawful Concerted Refusal to Deal

Appellants argue that the eligibility rule "is not a commercial boycott." Br. 51-54. This appears to be an argument on a fact issue which was resolved against defendants at trial, and is not appropriate on appeal. *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 4 L.Ed.2d 142 (1959). If appellants mean to argue that there was insufficient evidence to take the boycott issue to the jury, they may not do so on appeal for the first time. They did not claim in the trial court that the evidence of boycott was insufficient or that the issue should not be submitted to the jury. Such a claim may not be made for the first time on appeal. *Grant v. United States,*

291 F.2d 746 (9th Cir. 1961), cert. den., 368 U.S. 999, 72 Ed.2d 537; and see the discussion of this rule in the section on Damages, *infra*.

In any event, the evidence was overwhelming that the eligibility rule was a boycott which both sought and achieved commercial impact. It was an agreement of defendants not to deal with others as to tournament bowling *unless the customers entirely boycotted defendants' competitors as to all organized bowling*. It was not enough for defendants if a customer bowled in several leagues in their houses and one in an independent house; they would still ban him from tournament bowling until he withdrew entirely from the independent house and gave all his business to them. Appellants argue that their rule was like the offer of "premiums or trading stamps," and complain that the instructions here meant they "could not lawfully conduct any tournament in which only their customers were eligible." Br. 57, 60. But premiums and trading stamps are given in return for custom, not as payment for boycotting competitors. The eligibility rule was not like an oil company giving merchandise with purchase of its gasoline. Rather, it was like the major oil companies forming an association and refusing to sell premium gasoline at all unless the customer bought all his petroleum products from them and none from companies outside the group. Thus at trial, the WSBPA president was forced to admit that other trade associations do not require customers to do all their business with members, and boycott non-members, as a condition of dealing. Tr. 2400, 2405, 2414-15.

The only other court which has yet ruled on the eligibility rule under antitrust laws is the Superior Court of California for Santa Clara County. In

People v. Santa Clara Valley Bowling Association, Civil Cause No. 125346, now on appeal to the California Supreme Court, the rule was held to be an unlawful group boycott under a state statute similar to the Sherman Act. The Superior Court's conclusions in this unreported case are reproduced as Appendix C hereto, and read in part:

> "The BPAA tournament eligibility rule requiring bowlers to confine their league bowling exclusively to BPAA member establishments . . . constituted a concerted refusal by BPAA members to deal with bowlers who patronized non-BPAA member competitors and a group boycott of such bowlers, a secondary boycott and agreement to coerce bowlers to not deal with non-BPAA members . . . an unreasonable restraint upon trade and commerce, and a trust, against public policy and void . . ." Appendix C, *infra.*

That bowling is "a business, but a business of sport" (Tr. 1972) gives no exemption. Organized sports are subject to the antitrust laws. *Radovich v. National Football League, supra; International Boxing Club v. United States,* 358 U.S. 242 3 L.Ed.2d 270 (1959); *National Wrestling Alliance v. Myers,* 325 F.2d 768 (8th Cir. 1963); *American Football League v. National Football League,* 323 F.2d 124 (4th Cir. 1963); *Washington Professional Basketball Corp. v. National Basketball Ass'n.,* 147 F. Supp. 154 (S.D.N.Y. 1956).

Defendants tried to compare their eligibility rule to those of the ABC; but the ABC is a non-commercial organization which prescribes standards for equipment, scorekeeping, and conduct of tournaments, and its rules do not require a bowler to boycott other tournaments as a condition of entering ABC-sponsored events. Tr. 2394-2396.

Bowling is an industry involving millions of dollars in transactions each year. Between five and seven million men are organized in the ABC (Tr. 142) and about three million women belong to the WIBC (Tr. 228). Including non-members of the bowlers' organiations, approximately thirty-six million Americans bowl each year. R. 95. The Washington State Bowling Association has about 100,000 members (Tr. 76), and the Washington State Women's Bowling Association has about 74,000 (Tr. 228). The yearly gross revenues from bowling in Washington, according to the WSBPA 1964 annual report, are $13,500,000. Ex. 225.

Not only is bowling a substantial line of commerce, but defendants overwhelmingly control it. Tr. 702, R. 114.

League bowling engages about 7,000,000 customers, and accounts for about half of all revenue earned by commercial bowling houses. R. 95. One of the main inducements to any bowler to engage in league bowling is the prospect of participating in tournaments. Tr. 143. In recent years about 500,000 league bowlers have taken part annually in the national BPAA tournaments (R. 114); this figure does not include participation in the tournaments run by affiliated associations and members. A booklet of the BPAA described the business importance of tournaments:

> "The promotion of tournaments has rapidly become an important phase of today's bowling establishment operation . . . Tournaments serve a number of important purposes. Naturally, they are intended to supplement open play lineage . . . Tournament bowlers are, for the most part, the most active and enthusiastic element of the bowling public. The tournament bowler

spends a greater portion of his recreational dollar on bowling." Ex. 227.

The tournaments run by association members were not a financial sacrifice for the purpose of improving the game, as defendants claimed, but a source of additional revenue. Usually a choice had to be made between a number of houses applying for the same tournament. Tr. 150. Announcing a forthcoming tournament to its members, the WSBPA wrote: "Be sure to get your share in 1963$!" (Ex. 156). The 1962 WSBPA Summer League Tournament, a small one, was produced at a net profit (direct costs against entry fees) of $4.42, and brought extra lineage to the association members worth $12,684. Ex. 153. The 1964 report of the WSBPA tournament committee stated:

> "You will be interested in the fact that 155,000 scheduled lines were derived from these tournaments. . . . these lines were gotten at very little expense per lane for proprietors. The lineage is worth, dollar wise, $77,500 to the participating proprietors." Ex. 225.

The same exhibit showed that the $77,500 in revenue was produced at a total cost of $4,391.51.

Nationally, the BPAA income for the year just preceding the 1961 convention was over $768,000; total expenditures were about $493,000; ending cash balance was $662,000; and cash balance in the tournament fund was $191,000. Ex. 128, Tr. 2126-2129.

One tournament alone produced enough profit to pay all association dues for Washington State members. Exhibit 261r is an excerpt from "The Bowling Proprietor", official BPAA magazine, for April, 1963. It reads in part:

> "The total number of lines derived in the house eliminations [in the BPAA Handicap Tourna-

> ment] in Washington in 1962 was 122,490 lines. In the zone finals, another 29,760 lines were rolled, for an amazing total of 152,250 lines—more than 43 extra lines per member lane.
>
> "These 43 lines represent an extra income of $21.50 per lane, which would pay the entire dues package for most BPAA members in most states."

Defendants' professed reason for the eligibility rule was to prevent "sandbagging", the intentional compiling of a low average by a bowler to obtain a high handicap for tournament purposes. Tr. 1655, 1721, 1754, 1871, 2194. But none could testify to any real connection between the rule and the prevention cheating. The ABC—the organization of the bowling competitors themselves, not of the business men who own the bowling alleys—promulgates the rules of fairness in the game and keeps the bowlers' averages. Tr. 89, Ex. 239. No one claimed the ABC was remiss in its duties; defendant Cunningham admitted it does a good job of keeping the averages. Tr. 1872. And "sandbagging" itself was shown to be a myth—not a genuine problem. The witness Doepke, a bowler for 57 years and former president of the San Jose bowlers association, had never seen a case of it. Tr. 539-542. Stowe, secretary of the Tacoma City Bowlers Association, had never known of a substantiated case of it. Tr. 91. No defendant testified to ever having found anyone cheating in his bowling establishment (*e.g.,* Tr. 1758, 2136). Defendant Tadich, a bowling proprietor for many years, was asked if there was any difficulty in running tournaments before the eligibility rule was adopted, and answered: "All the tournaments I run in all the years I have been in the game, I never had any difficulty or no beef from anybody." Tr. 1026-

1028. The league secretaries, not the proprietors, keep the bowlers' scores and averages. Tr. 2195-96. And, of course, if defendants wanted to discuss a bowler's honesty at their meetings they could do so whether or not he did some bowling at an independent house. Tr. 1721.

Beyond this there was much evidence which proved the absurdity of the "sandbagging" argument and showed the conspirators' aim was to enforce a secondary boycott injuring their competitors:

(1) Defendant Redig admitted that a purpose of the rule he heard discussed at association meetings was to prevent league business from going to nonmember houses. Tr. 1757-1758.

(2) Defendant Cunningham admitted hearing discussions at association meetings that a purpose of the rule was to limit or control the number of new bowling establishments. Tr. 1879-1880.

(3) Loveless, asked to give the substance of a conversation with Corbett about the eligibility rule, testified:

> "He stated that the eligibility rule was developed by the members of the Association for the protection of the people in the bowling business, and that the overbuilding situation was something that could run all bowling proprietors out of business, or at least make the situation to where it would not be profitable . . ." Tr. 740-742.

The same explanation was given to Loveless by Cunningham and by Allen Mason, the executive director of WSBPA. Tr. 743.

(4) The rule was explicitly treated by the associations as a way of channeling business to the members. When it was expanded to include tourna-

ment as well as league bowling, the BPAA announced to its members:

> "The above Rule is another big reason why more and more bowlers are aware of the advantages they enjoy by bowling in member houses. Be sure your bowlers are advised of the above rule changes so they will be prepared for next season and remain eligible for the BPAA national events and those sponsored by your local, district and state associations!" Ex. 81.

Referring to a proposed bowling alley at the Eagles Lodge in Yakima, the chairman of the WSBPA Overbuilding Committee wrote:

> "I think these fellows are realizing that having their bowlers barred from tournaments, from the All Star, and from any other BPAA benefits is an important thing and can become increasingly more so." Ex. 16.

(5) Many tournaments, including most of the national ones, are "scratch" tournaments. Tr. 2133. In these the bowlers simply compete for the best score. No handicaps are used, and the bowlers' averages and past scoring records are not involved at all. There is no way to cheat in a scratch tournament. Tr. 1662. Nevertheless, the eligibility rule was enforced in scratch tournaments, and bowlers wishing to enter them were required to do no league or tournament bowling in non-member houses. Tr. 2134.

(6) The rule bars from tournaments anyone who is a part owner or shareholder of an independent bowling house, or who is employed by an independent. R. 163-165, Tr. 1661, 2201. This bar is absolute and has nothing to do with scoring averages or handicaps. Tr. 1661, 2199. An employee of an independent house would be barred from tournaments

even if he did all his organized bowling in association houses. Many proprietors like to hire "name" bowlers and high-average bowlers, especially to work as teachers; and these capable bowlers want to bowl in tournaments. Tr. 208-211. The sole purpose and effect of this part of the rule is to deprive independent houses of employees.

(7) In 1960-61 the rule barred from tournaments any bowler who had done any exhibition bowling in an independent house. Tr. 208-211. Exhibition bowling is commonly done by professional bowlers and is valuable in attracting spectators and potential customers to bowling alleys. It does not count in a bowler's scoring average, and has nothing to do with his handicap for tournament purposes. Tr. 2281. The purpose and effect of this part of the rule was to make it impossible for independent houses to hire professionals to do exhibition bowling.

(8) The rule was enforced against entire teams of five or more bowlers if one team member had bowled in an independent house. All of the members of such teams were disqualified even if most of them did all of their organized bowling in association houses. Tr. 206.

(9) A traveling league is one which goes from house to house, bowling at different alleys on different nights. Bowlers who belonged to a traveling league which did any bowling at an independent house, even one night, were ineligible for tournaments. Tr. 219. A bowler could not gain eligibility by "sitting out" and not bowling on the nights when his league visited an independent house; he was barred from tournaments simply for *belonging* to a league which gave any business to an independent. Tr. 219, 2142-44, Ex. 135.

(10) When an independent house burned down or went out of business, and its bowlers moved to a member house, they immediately became eligible for tournaments. Exs. 109, 110. In such cases their bowling averages from the defunct non-member house would be used for tournament handicap purposes. Tr. 215.

(11) The eligibility rule was enforced not only against adults but also against children through the YBA, the BPAA's youth bowling organiaztion. To be eligible for a YBA tournament, the applicant was required to bowl in an association house; if he lived in a small town having only one bowling alley, and that one independent, he would be barred from tournaments. Tr. 1877. Boys were ruled ineligible for YBA tournaments because they bowled at Pacific Lanes. Tr. 819-820. Asked if this rule was to prevent the children from cheating, defendant Cunningham first answered "Oh, definitely, it is not to prevent cheating" (Tr. 1877) and then changed his answer to "Partially" (Tr. 1878).

(12) The BPAA allowed bowlers to enter tournaments, regardless of where they had bowled in the past, if they signed affidavits that they would in the future restrict their bowling to member houses. Tr. 216, Exs. 43, 119. In such cases the bowler's past average from an independent house would be used in computing his handicap. And the rule was used to force new houses to join the BPAA. Bowlers were allowed to play at a non-member house during the first 30 days of its operation; after that, if the house had not joined the association, they were ineligible for tournaments. Ex. 79.

(13) Defendants not only enforced the eligibility rule themselves, but forced others to do so. The originator of the All-Coast Tournament, Lindblad,

testified that his tournament was the outstanding one in the Northwest; that for several years it was open to all ABC league bowlers; that in 1959 when he moved it to Vancouver, Washington defendants told him they would not cooperate, and would not support the tournament, unless he applied the eligibility rule; and that he had no choice in the matter, enforced the rule against his own wishes, and did so every year thereafter. Tr. 550-563, Ex. 105.

(14) The written version of the rule supposedly exempted tournaments conducted by the ABC or City Bowlers Associations affiliated with it; that is, a bowler could participate in such a tournament even if held at an independent house without forfeiting his eligibility for tournaments held in association houses. Exs. 126, 245. But defendants nonetheless invoked the rule to keep bowlers out of the 1961 Tacoma City Association tournament at Pacific Lanes. Tr. 95-98, 672-673. Defendant Unkrur told Jowett, a bowler, "Well, ways and means will be found to keep you out of the tournament." Tr. 648.

The only reasonable conclusion from this evidence is that the eligibility rule was an unlawful refusal to deal. It coerced the prospective customers to boycott defendants' competitors as a condition of dealing with those in the group. The concerted use of such a secondary boycott violates the Sherman Act. *Walker Dist. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1 (9th Cir. 1963).

Defendants' Requested Instructions Were Properly Refused

(Answering Appellants' Point 2, Brief 46-47, 58-60)

Appellants argue that the court erred in refusing to give their requested instructions 23 and 27. No

exception was taken in the trial court to the refusal of request 23. Tr. 2804-2810. Having entirely failed to except, appellants cannot now assign error to the refusal of the requested instruction. Rule 51, F.R.Civ.P.; *Sears v. Southern Pacific Co.,* 313 F.2d 498 (9th Cir. 1963); *Brown v. Chapman,* 304 F.2d 149 (9th Cir. 1962); *Hargrave v. Wellman,* 276 F.2d 948 (9th Cir. 1960); *Richfield Oil Corp. v. Karseal Corp.,* 271 F.2d 709 (9th Cir. 1959), cert. den., 361 U.S. 961, 4 L.Ed.2d 543.

Request 23 was an incorrect statement of the law in any event. It read:

> "Defendants have the right to adopt and enforce rules and regulations in order to regulate, standardize, and promote competition in the sport of bowling, and such regulations are not unlawful even though an incidental effect may be to restrict the business of the plaintiff."

Such an instruction would have told the jury the defendants could lawfully adopt and enforce (against anyone, apparently) rules to regulate competition in bowling where the effect is to restrict the business of an outside competitor. But this is exactly the kind of conduct which the Sherman Act proscribes. Error may not be assigned to the refusal of a requested instruction which was inaccurate or deficient in any respect. *Alaska Pacific Salmon Co. v. Reynolds Metals Co.,* 163 F.2d 643 (2d Cir. 1947); *Southern Pac. Co. v. Souza,* 179 F.2d 691 (9th Cir. 1950); *Cherry v. Stedman,* 259 F.2d 774 (8th Cir. 1958).

Request 27 was also erroneous. It read:

> "If you find that the main purpose and chief effect of the eligibility rule and its enforcement is to foster the bowling business by the promotion of standardized rules and regulations re-

> garding participation in tournaments without any unlawful intent to monopolize or restrict trade, then even though such rules or regulations incidentally restricted competition and interstate commerce, such acts do not constitute a monopoly or attempted monopoly in violation of the antitrust statutes of the United States."

The statement that "such acts do not constitute a monopoly or attempted monopoly" is out of place and could not possibly "balance" a group boycott instruction given under Sherman Act § 1. It is well settled that a group boycott violates Section 1 regardless of whether the group has monopoly power or is engaged in an attempt to monopolize. *Eastern States Retal Lumber Dealers' Ass'n. v. United States,* 234 U.S. 600, 58 L.Ed. 1490 (1914). The District Court said of request 27:

> "Moreover, the instruction is incomplete in that it does not explain the course for the jury if the incidental effect is one that 'may be to substantially lessen competition.' This is precisely why group boycotts are illegal." R. 243; Appendix D, *infra.*

At trial defendants did not contend the instruction was correct as drawn. Defense counsel said after the charge was read:

> "27 was the request we gave relative to the effect of the eligibility rule. I don't think we got down to discussing whether the particular working of 27 was appropriate or not . . ." Tr. 2805.

Following the conference on instructions during trial (Tr. vol. 12) defendants submitted nothing further in writing. Requests 23 and 27 were properly refused.

The Special Finding on Sherman Act § 2 Independently Sustains the Verdict

The jury found defendants violated both Section 1 and Section 2 of the Sherman Act. The group boycott instructions discussed above related to Section 1, conspiracies in restraint of trade. They did not apply to Section 2, attempts and conspiracies to monopolize. The jury's specific finding on Section 2 moots appellants' argument about the boycott instructions.

The special interrogatory on Section 2, and the jury's answer, were as follows:

> "Do you find from a preponderance of the evidence that ANY of the defendants named in the second part of this interrogatory attempted, among themselves or with others, to monopolize or conspired to monopolize any part of the trade or commerce of the United States? (Section 2, Sherman Act)"
>
> "ANSWER: Yes." R.221.

The record is replete with evidence to support this finding. The overbuilding committees of the state and national associations repeatedly tried to block the sale of bowling equipment to newcomers in the field. Although defendants opposed every proposed new sale by AMF in Washington on grounds of purported economic unfeasibility, none of the new houses which got AMF equipment had gone out of business by the time of trial. Tr. 307. Only one small house in Tacoma closed although the number of lanes tripled in a few years. Ex. A-8. The overbuilding committee wrote that Spokane was "overbuilt" when it had one bowling lane per 2,000 people (Ex. 113) and that Tacoma was "overbuilt" with 1,835 people per lane (Ex. 4); yet Corbett, President of the WSBPA, himself invested money and built a

large bowling house on the basis of one lane per 1,000 population (Tr. 363). In 1959 defendants told Hoffman Pacific Lanes should not be built because there were already too many bowling alleys in Tacoma (Tr. 575), yet later that year defendant Redig began construction in Tacoma of Bowlero, a 32-lane house (Tr. 1072), and other defendants built New Frontier, another 32-lane house, after Pacific Lanes started business. Tr. 1644.

Defendants' intent to monopolize is shown clearly by the correspondence of the overbuilding committee. The following excerpts are illustrative:

In 1958 the committee chairman wrote to a fellow member regarding keeping an Eagles bowling establishment out of Walla Walla:

> ". . . I will get together with Phil Cunningham and we will go to work on the supplier over here on the managerial level and take it to higher authorities and to the BPAA if you think it is necessary." Ex. 7.

In 1959 the committee wrote to a member in Anacortes about the problem of an independent operator planning to open business there:

> "We do not require any authorization from a present member as to his plans for expansion of any existing facility . . . Where our committee does come into the picture is in a case where another installation is planned in the same area where one of our members is presently operating . . . *We think that we have been successful in some cases in eliminating or discouraging new operations* . . . However, I might point out to you that we had a call a short time ago from Mr. Manous of AMF in which he advised us that there was a party definitely interested in putting a new installation into Anacortes. We talked to him on the phone and cited population

> figures in your area and suggested that they look into the situation very seriously before accepting an order . . .*I would suggest that if you are in a position to do so that you launch your project as quickly as possible . . .*" (Emphasis added.) Ex. 26.

For several months defendant succeeded in blocking the sale of equipment to the Loveless brothers, who were trying to establish Secoma Lanes between Seattle and Tacoma. The overbuilding committee wrote to AMF:

> "We are firmly convinced that no new installations are warranted in this particular area and that the sale of any such installation would be extremely harmful to the existing operations. As a result of the intensive interest in this area, three of the present proprietors are definitely committed to enlarge their present facilities against their better judgment, but they feel that it is necessary as a form of insurance to keep from being raided by new houses . . ." Ex. 29.

When AMF and Brunswick refused to sell to Secoma Lanes, defendants wrote to AMF:

> "Now about the Loveless brothers' 24 lane house referred to in your second letter. We are very appreciative of the fact that you notified this customer that you would not be able to accept the Sjostrom order. We, in turn, are very happy to tell you that your major competitor has also turned this installation down. We have seen the letter of rejection and are in a position to notify you that this is not hearsay. The victory as far as we are concerned is academic because although the Loveless brothers will not be permitted to go ahead with their 24 lanes the district will be saddled with an additional 28 lanes by the present operators taking steps to protect their existing investment . . .*They*

feel that unless they saturate the district themselves that very shortly someone else will find ways and means of going into business in the area." (Emphasis added.) Ex. 34.

The eligibility rule's destructive power over nonmembers was part of the scheme to monopolize. Defendants used the threat of denial of membership in the association in trying to exclude others from the field. Exs. 44, 45. Secoma Lanes, after it succeeded in starting business, was kept out of the association from 1959 until early 1961. Tr. 733, 748. Aberdeen Lanes and Lacey Lanes, owned by the same management, were denied membership because of their connection with Secoma Lanes. Tr. 734-36, 746, 748. The witness Kennedy heard defendant Cunningham say, at a meeting of the P-OBPA, "I don't want Secoma admitted" to membership. Tr. 432. Mrs. Coles, a former proprietor, testified to another association meeting in late 1959 at which Cunningham said, concerning the application of Secoma Lanes for membership, to "give him three months and he would break them." Tr. 243-244, 249. Other evidence of the joint use of the overbuilding committee and the eligibility rule is summarized in the section on Interstate Commerce, *infra*.

Monopolization was part of the nationwide conspiracy. In organizing the overbuilding committee in 1957, the BPAA president referred to the need to "see if something could not be done at this meeting to try and keep our industry where it has been in the past." Ex. 1. One and one-half years later a different BPAA president referred to the problem of "every Tom, Dick and Harry, every sharpshooter, every promoter trying to get into the bowling business . . ." Ex. 22. The problem of "overbuilding"—the job of trying to keep newcomers out

of the bowling business—was attacked mainly at the local level because the BPAA decided that would be the most effective approach. Exs. 24, 18, 57.

Appellants cite *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656 (9th Cir. 1963), which simply holds that the offense of attempting to monopolize—absent actual monopoly power—requires proof of specific intent. Here there was ample proof of the unlawful intent. Indeed, defendants have not questioned the sufficiency of this evidence at trial or upon appeal.

The court instructed the jury separately under Section 1 and Section 2:

> "As I have stated, the plaintiff contends that the defendants, together with other persons or corporations, violated one or more of the following provisions of the Sherman Act:
> "First: Section 1, which provides that any combination or conspiracy in restraint of interstate trade is unlawful; and
> "Second: Section 2, which provides that an attempt to monopolize is unlawful; or a combination or conspiracy formed to monopolize interstate trade or commerce is unlawful." Tr. 2758-2759.

The jury was instructed in detail on monopoly power, specific intent, and plaintiff's burden of proof. Tr. 2766-2770. These instructions included the following:

> "If there is power to control or dominate such market, to exclude actual or potential competitors therefrom, or to otherwise unreasonably suppress competition therein, this is sufficient to constitute monopolization under the antitrust laws . . . As I have said earlier, even if a person is unsuccessful in obtaining sufficient control over an industry to constitute full monopoly power, he may still be in violation

> of the antitrust laws, if in his efforts he is found to have a specific intent to monopolize and thereby exclude competition. *Specific intent is the conscious knowledge and desire to accomplish monopolization."* (Emphasis added.) Tr. 2768.

Under these instructions the jury specially found defendants had conspired or attempted to monopolize a part of commerce. This finding goes beyond the Section 1 finding of a combination in restraint of trade, and is apart from the group boycott instructions. That group boycotts are prohibited under Section 1 would not affect the narrow issue which the jury was charged with resolving under Section 2, that of whether defendants had consciously sought monopoly power in the Tacoma-Pierce County bowling market.

The special verdict under Section 2 thus sustains the judgment regardless of appellants' argument on the boycott instructions. Any error in those instructions would have been harmless and hence no ground for reversal. *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 3 L.Ed.2d 550 (1959). Where special findings show a party was not injured by an erroneous instruction, the claimed error is without prejudice. *Bass v. Dehner,* 103 F.2d 28 (10th Cir. 1939), cert. den., 308 U.S. 580, 84 L.Ed. 486. The rule is expressed as follows in 5A C.J.S., Appeal & Error, § 1773 (3):

> "Thus, where the jury returned its verdict on an issue with respect to which there was no error, error in instructions on other issues is harmless and will not constitute reversible error."

Here, the special verdict finding a violation of Section 2 by all defendants independently suffices to support the judgment for plaintiff.

DAMAGES

(Answering Appellants' Point 3, Brief 47, 62-73)

The Correct Period of Damages Was Used

Appellants argue that the complaint herein was filed in December, 1961, and that the damages awarded plaintiff should have been limited to those incurred up to that time. This argument was not made in the post-trial motions below (R. 227), nor was any such issue mentioned in the statement of points filed under Rule 75, F.R.Civ.P. and Rule 17 (6) of this Court. (R. 259). Where an appellant fails to include a point in the statement of points, he has not complied with Rule 75 and the court need not consider such a point later argued before it. *Watson v. Button,* 235 F. 2d 235 (9th Cir. 1956); *State Farm Mutual Auto. Ins. Co. v. Porter,* 186 F.2d 834 (9th Cir. 1951); *Western Nat. Ins. Co. v. LeClare,* 163 F.2d 337 (9th Cir. 1947). See also, *Ritchie v. Drier,* 165 F.2d 239 (D.C. Cir. 1947), cert. den., 334 U.S. 860, 92 L.Ed. 178; *Sword v. Gulf Oil Corp.,* 251 F.2d 829 (5th Cir. 1958), cert. den., 358 U.S. 825, 3 L.Ed. 2d 65.

Moreover, appellants' argument ignores the agreed pretrial order which was entered by the District Judge and which framed the issues, including the period of damages, for trial. Before trial, counsel worked in discovery proceedings with the understanding that plaintiff was alleging, and the court would try issues concerning, continuing violations of the antitrust laws to the time of trial accompanied by damages throughout the entire period involved, i.e., the three bowling seasons 1961-62, 1962-63, and 1963-64. The agreed pretrial order, drawn in the fall of 1964, included agreed facts and allegations of both sides extending far past the time of filing the

complaint and to the time of the trial in 1964. Among these was plaintiff's controverted claim that it had suffered damage of $50,000 "to date", i.e., to the time of the pretrial order. The following are excerpts from the pretrial order (emphasis added throughout):

2 (m) (agreed fact):

"On September 12, 1963, the Bowling Proprietors Association of America, Inc. . . . modified the eligibility rule of that association . . . The Washington State Bowling Proprietors Association on May 10, 1963, adopted the following rule . . ." R. 164.

3 (s) (1) (contention of plaintiff):

". . . Although the 'eligibility rules' were ostensibly modified in 1963 . . . the said agreements *are still carried out* in substance by defendants and their co-conspirators . . . the intended and actual effect of the said agreements, rules and practices *has been and is* to deprive non-member establishments of the patronage of persons who wish to engage in organized bowling . . ." R. 171.

3 (y) (contention of plaintiff):

"As a direct and proximate result of the combination and conspiracy hereinabove alleged, *plaintiff has been injured in its business to its damage, to date, in the amount of* $50,000." R. 174.

4 (f) (contention of defendants):

"The plaintiff's payments for equipment purchased from out-of-state manufacturers have increased substantially *for every year of its operation.* The plaintiff's purchase of bowling balls . . . and other items for resale from out-of-state manufacturers have substantially increased *every year since it began business.* The

plaintiff's gross income has substantially increased *every year since it began business.* The plaintiff's business is one of the very few bowling establishments in Pierce County to realize a profit *during the years* 1959 *through* 1964 . . ." R. 176.

(5) (c) (issue of fact):

". . . to what extent, if any, have the said agreements and practices of the defendants injured the plaintiff in its business?" [No time restriction is expressed in this issue of fact.] R. 181.

The stipulation to these contentions and issues made it unnecessary for plaintiff to file a supplemental complaint, which it otherwise could have done under Rule 15 (d), F.R.Civ.P. When the parties submitted an agreed pretrial order to the court setting forth their respectives contentions and the issues, they were bound thereby and the issues to be tried were those agreed upon and adopted by the court's entry of the order. Plaintiff was entitled to present evidence on the full period of damages covered by the contentions of the parties in the pretrial order. Rule 16, F.R.Civ.P.; *Fowler v. Crown-Zellerbach Corp.,* 163 F.2d 773 (9th Cir. 1947); 1A Barron & Holtzoff, Federal Practice and Procedure, § 473, pp. 844, 847; *Shell v. Strong,* 151 F.2d 909 (10th Cir. 1945); *Daitz Flying Corp. v. United States,* 4 F.R.D. 372 (E.D. N.Y. 1945).

Just before trial, despite these provisions of the pretrial order, defendants unexpectedly questioned whether plaintiff's damage proof should extend beyond December, 1961. In response to this plaintiff submitted a memorandum (R. 263) which showed that all parties had prepared to try the damages issue through the 1963-64 season. At a deposition of

Hoffman taken several months before trial plaintiff's damage claim was given as about $50,000 for the three years. R. 266. Defendants' accountant testified in his pretrial deposition that his job, done in conjunction with defense counsel, was to examine plaintiff's financial records and alleged damages to the end of the 1963-64 season. R. 266-269. Defendants prepared detailed accounting exhibits dealing with the damages issue for all three seasons, and filed a list of these before trial. R. 115, Exs. A-5, A-13, A-14, A-18, A-19.

When these facts were shown to the court, defense counsel suggested that plaintiff proceed with damages proof for the entire period and that the court could rule later. Tr. 853. Defendants never attempted to controvert plaintiff's memorandum, and submitted nothing further on the question. During Hoffman's testimony defense counsel interposed "an objection as to damages beyond December 7, 1962 [*sic*]", adding "I understand the Court previously ruled." Tr. 1141. The damages evidence was admitted without further comment.

The court instructed the jury:

> "If you find that the plaintiff did suffer injury because of the alleged violations of the defendants the plaintiff nonetheless can only recover for damages suffered between October 15, 1960, that is the date he left the Association, and the end of the 1963-4 bowling season, which ended last spring sometime. Now even though the plaintiff may have suffered injuries outside of this period it cannot recover those damages, if any, in this action, and you are directed not to assess any damages except for the period I have just stated." Tr. 2782.

Defendants did not except to this instruction (Tr.

2804-2810) and cannot contend for a different damages period at this stage of the proceedings; the instruction is the law of the case. *State Farm Mutual Auto. Ins. Co. v. Porter,* 186 F. 2d 834, 845 (9th Cir. 1950).

The policy of the federal courts is to expedite justice by disposing of an entire controversy in one action. *Mitchell v. RKO Rhode Island Corp.,* 148 F. Supp. 245 (D. Mass. 1956). Here the District Court's ruling was also required by the pretrial order. The entire conduct of the trial by defendants showed they had prepared to meet the damages issue for all three seasons. Both sides presented evidence without objection of many events which occurred in the period 1962-1964. The argument appellants now undertake is completely without merit.

Appellants May Not Question the Sufficiency of the Damages Evidence for the First Time on Appeal

At pp. 47 and 66-73 of their brief, appellants contend that the evidence of damages was insufficient to support the verdict. This marks the first time appellants have tried to raise such an issue. They made no such claim in the trial court. Appellants may not raise this argument for the first time on appeal, and it should not be considered.

Questions of sufficiency of the evidence may be raised at trial only by a proper motion for directed verdict at the close of the evidence. *Oslund v. State Farm Mutual Auto. Ins. Co.* 242 F. 2d 813 (9th Cir. 1957); *United States v. City of Jacksonville,* 257 F. 2d 330 (8th Cir. 1958). Rule 50 (a), F.R.Civ.P., requires that "A motion for a directed verdict shall state the specific grounds therefor." Where no motion for directed verdict is made—or where one is

made, but the grounds are not specifically stated—nothing is perserved for appeal and no issue as to sufficiency of the evidence is before the appellate court. *Virginia-Carolina Tie & Wood Co. v. Dunbar,* 106 F. 2d 383 (4th Cir. 1939); *Lightfoot v. Weis,* 213 F. 2d 847 (5th Cir. 1954); *Capital Transportation Co. v. Compton,* 187 F. 2d 844 (8th Cir. 1951), cert. den. 368 U.S. 999, 7 L.Ed. 2d 537; 2B Barron & Holtzoff, Federal Practice and Procedure § 1073.

In *Grant v. United States,* 291 F. 2d 746 (9th Cir. 1961) this Court held at p. 748:

> ". . . The very purpose of such a rule is to enable the court to consider it below—to prevent error—to avoid appeal. *The insufficiency of the evidence, not having been raised below, cannot be raised for the first time on appeal.* Cellino v. United States, 9 Cir., 1960, 276 F. 2d 941; Wayne v. United States, 8 Cir., 1943, 138 F. 2d 1, certiorari denied 320 U.S. 800, 64 S.Ct. 429, 88 L.Ed. 483; Silva v. United States, 9 Cir., 1929, 35 F.2d 598, rehearing denied 38 F. 2d 465, certiorari denied 281 U.S. 751, 50 S.Ct. 354, 74 L.Ed. 1162." (Emphasis added.)

The motion must state the specific ground which the party later seeks to argue on appeal. Where a motion for directed verdict attacks one element of proof, but not the element later argued on appeal, the latter has not been preserved for review and is not before the appellate court. *Stilwell v. Hertz Driveurself Stations, Inc.,* 174 F. 2d 714, 715 (3rd Cir. 1949); *Friedman v. Decatur Corp.,* 135 F. 2d 812 (D.C. Cir. 1943); *Randolph v. Employers Mutual Liab. Ins. Co. of Wis.,* 260 F. 2d 461 (8th Cir. 1958), cert. den. 359 U.S. 909, 3 L.Ed. 2d 573.

In the present case, appellants moved for a directed verdict solely on the ground that the evidence

did not slow defendants' activities had sufficient effect on interstate commerce. They stated their motion at the end of plaintiff's case and renewed it at the end of all the evidence. Tr. 1228-1237, 2540-2541. The only ground mentioned was "a question of whether interstate commerce is involved here" (Tr. 1232), and that commerce "was not substantially affected" (Tr. 2541).

After trial, defendants filed a written "motion for judgment notwithstanding the verdict of the jury, or, in, the alternative, for a new trial." R. 227. Grounds 1, 10 and 13 of the written motion were the only ones based on claimed insufficiency of the evidence; these merely reiterated defendants' arguments about interstate commerce. Thus in reviewing defendants' motion after trial under Rule 50(b), the court considered and decided the only question raised, that of whether the interstate commerce evidence was sufficient. R. 232-235; Appendix D, *infra*.

Although given three opportunities—at the close of plaintiff's evidence, at the close of all the evidence, and in the post-trial arguments—to raise any ground they wished, appellants never raised any damages issue. The trial court was given no hint that they thought the damages evidence insufficient. Appellants have disregarded Rule 50(a) and may not raise the damages issue for the first time on this appeal.

The Jury's Findings on Damages Were Amply Supported by the Evidence

Even if the question were reached, the evidence was more than sufficient to support the special findings on damages. In antitrust cases, once the jury finds that plaintiff was injured by defendants'

violations of the law, it may establish the amount of damages by estimate even though the result is only approximate. In showing the *fact* of damage "plaintiff is required to establish with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue." *Flintkote Co. v. Lysfjord,* 246 F.2d 368, 391 (9th Cir. 1957), cert. den., 355 U.S. 835, 2 L.Ed.2d 46. But the fact of damage, like any other fact, may be established as a matter of just and reasonable inference from the evidence. *Bigelow v. RKO Radio Pictures, Inc.,* 327 U.S. 251, 264, 90 L.Ed. 652, 660 (1946).

See also, on proof of the fact of damage in antitrust actions, *Simpson v. Union Oil Co. of Calif.,* 337 U. S. 13, 12 L.Ed.2d 98 (1964), reh. den., 377 U.S. 949, 12 L.Ed. 2d 313; *Becken Co. v. Gemex Corp.,* 272 F.2d 1 (7th Cir. 1959), cert. den., 362 U.S. 962, 4 L.Ed.2d 876.

The *amount* of damages in antitrust cases is necessarily imprecise. But "justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures, Inc., supra,* at 265. The jury may thus fix the amount of damages by estimate. *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U.S. 359, 71 L.Ed. 684 (1926); *Story Parchment Co. v. Patterson Parchment Co.,* 282 U.S. 555, 75 L.Ed. 544 (1931).

Evidence of the amount of damages can be sufficient even though circumstantial, *Eastman Kodak Co., supra,* and estimated future profits may be shown by opinion testimony, although such testimony is not necessary and the jury is entitled to determine the damages from the raw data before it, *William H. Rankin Co. v. Associated Bill Posters,*

42 F.2d 152, 155-56 (2nd Cir. 1930). Plaintiff is not confined to one particular type of injury, but may recover for all types of injuries resulting from the unlawful conspiracy or monopoly. *Flintkote Co. v. Lysfjord, supra.* Nor is plaintiff limited to any particular formula for the establishment of damages, *William H. Rankin Co. v. Associated Bill Posters, supra.*

Among the approved methods of estimating damages are the comparison of plaintiff's profits during the time it was injured by the antitrust violations with those it earned previously, *Eastman Kodak Co. v. Southern Photo Materials Co., supra,* and the comparison of plaintiff's sales and revenues with those of comparable competitors who were not injured by the violations. *Richfield Oil Corp. v. Karseal Corp.,* 271 F.2d 709 (9th Cir. 1959), cert. den., 361 U.S. 961, 4 L.Ed.2d 543; *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.,* 194 F.2d 846 (8th Cir. 1952), cert. den., 343 U.S. 942, 96 L.Ed. 1348; *North Texas Producers Ass'n v. Young,* 308 F.2d 235 (5th Cir. 1962), cert. den., 372 U.S. 929, 9 L.Ed.2d 733.

Fact of Damage

After opening in 1959 Pacific Lanes did well enough to add twelve lanes, making a total of 36, in the summer of 1960. At that time Pacific was still in the association. It left the association in the fall of 1960 and has been independent ever since. During that time there has been no other large independent house in Tacoma. Tr. 1123, 1126, 1130.

Hoffman testified:

"Q. What if anything happened in your business at Pacific Lanes after you withdrew from the Association?

"A. The balance of the 1960-1961 season, the bowlers were permitted to shoot in tournaments because they had started bowling the season at our house while we were in good standing with the BPA.
At the end of the 1960-1961 season we had leagues that pulled out and moved to other houses because of the eligibility rule.

"Q. Now generally speaking what has been the pattern of your business since that time?

"A. Since that time our business has decreased each year." Tr. 1127.

Hoffman also testified the eligibility rule "has hurt us considerably . . . it certainly keeps bowlers from bowling in leagues at our house." Tr. 1193.

The losses suffered by Pacific went far beyond the bowlers directly interested in tournaments and included whole teams of bowlers. Tr. 2457-8.

Many bowlers testified that they stopped bowling at Pacific and took their business elsewhere because of the eligibility rule. Some took their teams or friends with them. Among the bowlers who so testified were Kleinsasser (Tr. 715); Williams (Tr. 725-6); Doepke (Tr. 542); Pagel (Tr. 766-69); Jowett (Tr. 652); Mrs. Williams (Tr. 779); Garrison (Tr. 660); Marano (Tr. 484); Mrs. Athow (Tr. 531-34); Ehly (Tr. 517-23, 531-34); and Olson (Tr. 638-41).

Income from particular leagues and tournaments was taken from plaintiff by the conspiracy. Leagues moved out which were satisfied with Pacific and would have remained but for the eligibility rule:

(1) In 1960, while in the association, Pacific was the site of the annual City Association Tournament. The tournament was the largest Tacoma had yet had, involving 592 teams and about 3,000 bowlers. Tr. 93. The following year, 1961, Pacific, as an in-

dependent house, submitted a bid on the City Tournament and was awarded it. Tr. 1190. Defendants made every effort to use the eligility rule to destroy the tournament. Tr. 648, 672-73, 550-63. Stowe, the secretary of the City Association, testified that as a result of this the City Tournament, in its second year at Pacific, dropped to about 350 teams (about 1,750 bowlers). A year later, in 1962, the tournament was held elsewhere and participation went up again. Tr. 93-101. The bowling lines lost in the 1961 City Tournament because of the conspirators' activities amounted to 6,546. Tr. 1136, Ex. 259.

(2) The Invitational League was a league of high-average bowlers formed by plaintiff. It bowled at Pacific in 1960-61 and attracted many spectators. Tr. 972, 466. It was going to return the following season but the members at a meeting decided not to because the eligibility rule would ban them from tournaments. Tr. 974, 980-81, 638-41. Defendant Tadich told the meeting if they continued bowling at Pacific "they wouldn't be shooting in any tournaments," and the league disbanded. Tr. 461-64. Efforts to revive the league in 1963-64 were futile. Tr. 466-67.

(3) The Women's Invitational League was organized, had more than enough bowlers, elected a secretary, and was prepared to bowl in 1961-62 on the same nights as the men's Invitational. It broke up for the same reason and the bowlers went to New Frontier and started a different league. Tr. 981-82, 1000, 1161-62.

(4) The Tacoma Commercial League bowled at Pacific in 1959-60. Kleinsasser, its secretary, testified that after the eligibility rule problem arose the league voted to leave Pacific because of it, and that

all the bowlers were otherwise satisfied with Pacific. Six of the teams moved to Villa Lanes, and the league broke up. Tr. 713-714. (Kleinsasser mistakenly said the move was made at the end of the 1959-60 season; in fact it was made at the end of the following season when Pacific was out of the association, as indicated on the damages summary, Exhibit 259.)

(5) The Plywood League was formed originally by Stevenson. Tr. 1180. Krick, secretary of the league, instigated its removal from Pacific at the end of the 1961-62 season because of the eligibility rule; the bowlers voted to change to New Frontier, and the entire league moved. There was no other reason for the change. Tr. 509-511. At the time the Plywood League left, Stevenson was still a part owner and operator of Pacific Lanes. Tr. 1180.

(6) The Olympic League bowled at Pacific through the 1962-63 season, in which Ehly was president of the league. Just before the following season, Ehly said he would not continue at Pacific because he wanted to become eligible for tournaments. When Ehly took this stand the result was that the league voted to disband. Tr. 521-522.

None of these leagues was replaced except the Tacoma Commercial League in the one season of 1963-64, and Pacific continued to have the available time in which they could have bowled. Tr. 1131. Nor were the times filled by open play, and the house continued to have lanes available for open play every day. Tr. 1198.

Plaintiff was impaired in all three years in its efforts to form leagues and keep the trade of league bowlers. Potential customers knew of the eligibility rule and "a great number" refused to patronize the house. Tr. 1196-97, 679, 705, 709.

Not a single league has moved into Pacific since it became a non-member. Tr. 455. When Lakewood Lanes burned down none of its leagues went to Pacific even though the two houses were only about 5½ miles apart by freeway. Tr. 1147.

The general turnover in league personnel from year to year is about 30 percent in both day and night leagues. Tr. 1015. Against this, Pacific had a drop-out rate of 80 percent in the Bank of California League in the season just past, encountered "similar experiences, but not that drastic" in other leagues, and had an over-all league drop-out rate of about 50 per cent each year. Tr. 1149, 1456-2457.

The effect of the eligibility rule is just as hard on the day leagues as on the night leagues. Tr. 1186. The Tacoma Traveling League now bowls at all of the modern houses in Tacoma except Pacific. Tr. 468. Since leaving the association plaintiff has been unable to run a successful tournament. Tr. 1129-1130.

Open play as well as league play was lost by plaintiff. League play carries open play with it. Tr. 1149, 973. Bowlers like to do their open and practice bowling at the same place they bowl in competition. Tr. 718, 1149.

Pacific's total bowling revenues declined in each of the three seasons involved. Tr. 1904. Appellants argue that its open play receipts increased and that plaintiff therefore lost no open play. Br. 68. This does not follow; plaintiff still lost the open play of those customers whose league business was driven elsewhere.

Because of the eligibility rule plaintiff could not get an AMF staff exhibition bowler into the house, and was unable to get a professional tournament. Tr. 988-989, 992. Having a "name" bowler as an

employee would help bring in people to take lessons, but plaintiff could not hire one because of the eligibility rule provision barring employees of non-member houses. Tr. 1148, 1166, 2393.

The fact of damage was corroborated by evidence of injury to other independent establishments which lost business ranging from ten percent to half of their volume because of the eligibility rule: Secoma Lanes (Tr. 750-51), Burien Bowl (Tr. 792-93), and Consolidated Bowling Corporation (Tr. 1083-95).

The court instructed clearly that plaintiff had the burden of proving the antitrust violations, if any, had caused it actual financial loss. Tr. 2757, 2758, 2778. The jury returned the following special verdict:

> "Do you find, from a preponderance of the evidence, that the acts of one or more of the defendants caused financial loss to the plaintiff's business or property?
> "ANSWER: Yes." R. 223.

There is substantial evidence to support this finding and the jury's verdict must therefore stand. *Richfield Oil Corp. v. Karseal Corp.*, 271 F.2d 709 (9th Cir. 1959) cert. den. 361 U.S. 961, 4 L.Ed.2d 543.

Amount of Damages

As summarized above, plaintiff proved the conspiracy caused it to lose the business of the Invitational League, the Women's Invitational League, the Tacoma Commercial League, the Plywood League, the Olympic League, and part of the 1961 City Tournament, and to suffer, in addition, loss of individual bowlers, teams, open play, and day leagues. In computing the amount of damages, plaintiff listed separately the income lost from each specific league, and then added to it an approximation of

the additional loss, which, by its nature, could not be measured with precision. As to the particular leagues, damage was claimed only as to those whose places were not filled with other league business. Tr. 1131. For this reason the Tacoma Commercial League loss was shown only for 1962-63, not for 1963-64, since in the latter season its time slot had been filled by another league. Tr. 1198. Once a league was lost, however, it could not be recovered, as shown by plaintiff's experience with the Invitational League. Tr. 466-67.

The net amounts lost on the City Tournament and existing leagues in the 1961-62, 1962-63 and 1963-64 seasons were: $4,040.77 in the first season, $6,427.40 in the second, and $7,043.14 in the third, totaling $17,611.31. Ex. 259.

Beyond this, plaintiff lost numerous teams, open play, and tournament play. Tr. 1143. Hoffman gave his conservative estimate of this loss as two lines of bowling per alley bed per day. Tr. 1143, 1146. The estimate was based on his own knowledge of the business and the bowlers:

"Q. In making your computation, or in making your approximation of that loss, have you taken into account contact you have had with bowlers over the years?

"A. Yes, I have. We have been in business five years and know hundreds of bowlers and have talked to lots of them from time to time.

"Q. Any idea of about how many you have talked to about this matter over the years?

"A. It would run into the thousands, I think." Tr. 1197.

This estimate was competent and admissible. *William H. Rankin Co. v. Associated Bill Posters, supra.* The additional loss for the three seasons at

two lines per day amounted to $32,503.68, making a total of loss of $50,114.99. Tr. 1143, Ex. 259.

Fisher, an independent certified public accountant, worked with Hoffman in computing the net loss and preparing Exhibit 259. Tr. 1131, 1143. He verified the rate per bowling line charged, the bowling income from each loss item, the other income from merchandise sales, refreshment sales, and the like which the lost bowling business would have carried with it, the total gross income, the variable expenses which should be deducted from the gross income, and the net loss of $50,114.99. Tr. 1216-21. Fisher also verified that there was time open at Pacific for the lost leagues to bowl had they remained. Tr. 1212, 1220.

Rich, one of defendants' accountants, examined plaintiff's records, analyzed the figures used by Fisher, and concluded Fisher's expense figures were correct. Tr. 1324-25, 1410, 1413, 1423. He said that on two nights the Tacoma Commercial League and the Invitational League could cause Pacific to be overfilled by four to six lanes. Tr. 1371-72. But these involved the new leagues as to which Fisher testified "in one or two instances these were formed later in the season in these time spots, but there were other times available and they could just as well have gone into those time spots." Tr. 1220. Rich agreed that if the Pacific in fact lost two lines per day in addition to the particular leagues listed its loss would be $50,144.99. Tr. 1417-18.

A chart of the damages computed per plaintiff's evidence of lost leagues and other income is at Appendix B, *infra*.

But plaintiff's case in chief did not provide the only evidence of the amount of damages. Defendants' evidence supplied additional support for the

jury's finding by the often-used method of comparing the plaintiff's business and revenues with those of competitors not affected by the conspiracy. *Richfield Oil Corp. v. Karseal Corp.,* 271 F.2d 709 (9th Cir. 1959), cert. den., 361 U.S. 961, 4 L.Ed.2d 543; *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.,* 194 F.2d 846 (8th Cir. 1952), cert. den., 343 U.S. 942, 96 L.Ed. 1348; *North Texas Producers Ass'n v. Young,* 308 F.2d 235 (5th Cir. 1962), cert. den., 372 U.S. 929, 9 L.Ed.2d 733.

Defendants' experts were Ford and Rich, certified public accountants, and Professor North, an economist. Ford and Rich made an extensive study of ten of the approximately twenty bowling alleys in the Tacoma area. They took the income, expense and investment figures of the houses and adjusted them to eliminate accounting differences and to place all ten on the same accounting basis. Tr. 1264, 1267, 1362-64.

On the basis of this study defendants introduced voluminous testimony and foundation exhibits purporting to compare plaintiff's experience to that of the "industry sample." The "sample," however, was meaningless because it included seven older houses which were admittedly not comparable to Pacific Lanes, Tr. 1314-1315, 1408, 1464, 1920, and the industry figures showed a steady decline of business in the older houses and a shift to the newer ones. Tr. 1316, 1468, 2511.

The only comparable houses were the three large new ones: Pacific (built in 1959), Bowlero (1960) and New Frontier (1961). The witnesses for both sides agreed to this. Tr. 1128, 1168, 1315, 1464, 1478. North testified these three houses were the only ones that could be profitable. Tr. 1939. Rich found them "the most comparable." Tr. 1315.

Even among these three, there was evidence that Pacific Lanes had the best location and was superior in other respects. Tr. 1128, 947-49, 956, 320-21, 466, 105. Moreover, Pacific is 12½ per cent larger than Bowlero and New Frontier, and defendants' graphs and statistics made no allowance for this difference. Tr. 1483, 1501-1502, 1899-1902.

Nonetheless, comparison of the three demonstrated the injury to plaintiff and evidenced an amount of damages almost identical to that found by the jury. The first year in which all three houses were in existence was 1961. Tr. 1408-1409, 1479, 1971. True comparisons could therefore be made only for the calendar years 1961, 1962 and 1963. These showed that Pacific spent the most for advertising and promotion, from half again to twice as much as the other two, in all three years, but, in 1963 and at the time of trial, had the fewest night leagues, the fewest day leagues, and the fewest total leagues of the three. Tr. 1485, 1502. *Revenues of the two defendant houses went up each year while plaintiff's revenues went down each year.* Tr. 1904. Bowlero's income increased more markedly from 1961 to 1962 because of a $25,000 tournament held in 1962, and in 1963, without the tournament, still surpassed the figure for 1961. New Frontier increased each year. Tr. 1507, 2492.

Plaintiff was also the only one of the three bowling alleys that declined in bowling lineage, as well as dollars, in all three years. Tr. 1469-1470, 1489-1490.

Defendants' exhibits A-49, A-50 and A-51 showed the amounts "returned to owner from bowling operations" for the three houses. The figures represent the amounts received from bowling operations less actual expenses and less a standard amount for

pinsetter rental, building rental and depreciation. Tr. 1333-34, 1492-93. Ford testified that "return to owner" meant net income corrected to standardize the factors of interest on indebtedness and owner's salary. Tr. 1493. For the years 1961 through 1963, defendants' figures showed the following amounts returned to the owners: Bowlero $119,486, New Frontier $63,948, Pacific $55,296. Exhibits A-49, A-50, A-51; Tr. 1983-86. Plaintiff was thus the lowest in this category, even though the largest of the three. It was about $65,000 lower than Bowlero, a comparable house. The total for Bowlero and New Frontier was $183,434, or an average of $91,717. *This meant that plaintiff's standardized net income was* $36,421 *below the average of the other two.* Tr. 1986-88.

A chart of the damages based on comparative net income is at Appendix B, *infra.*

Defendants argued at trial (Exhibit A-75) and now reiterate (Br. 45) that if Pacific were awarded its claimed damages of $50,000 it would have earned much more than the next highest house. But in making this argument they use the misleading tactic of including the year 1960, and thereby measuring four years of plaintiff's revenues against three years of New Frontier's and three and a fraction years of Bowlero's. Although 1961 was the first year when all three houses operated, defendants' graphs commenced with January, 1960. Tr. 1408-1409, 1479, 1971. When the proper comparison of the three-year period was made, the result was that Bowlero's "return to owner" would be the largest even if the entire claimed damages of $50,000 were added to Pacific's total. Tr. 2495, 1995-96.

There was still a third method of computing the

amount of plaintiff's damages: through comparison of bowling lineage, rather than dollars. Fisher used the figures introduced by defendants' experts to prepare Exhibit 265, which charts the lines per alley bed for 1961-63 of Pacific and the average of the three comparable houses. After 1961 (Pacific's bowlers became ineligible for tournaments at the end of the 1960-61 season) plaintiff's lineage dropped each year. The average of the three houses —even weighted down by Pacific's decline—increased sharply in 1962 and in 1963 was again above the 1961 level. If Pacific had followed the three-house average—that is, if its bowling lineage commencing with the starting point of 1961 had kept pace with the three-house average—it would have had 86,646 more lines than it actually had in 1962, and 43,734 more in 1963. The total lineage lost by this measurement for the *two* seasons was 130,380. The total lineage lost as computed on Exhibit 259, plaintiff's summary exhibit, was 118,290 for the *three* seasons. Thus, by comparing Pacific's actual volume to the lineage it would have had by retaining its initial ratio to the three-house average the loss is shown to be greater in only two years than the loss plaintiff claimed for all three years. Tr. 2500-2503.

A chart of this method of computing the damages is at Appendix B, *infra*.

The court instructed the jury that "in determining the amount of damage, if any, you may not engage in guesswork or speculation." Tr. 2781. The jury returned the following special verdict:

> "What is the amount of loss which you find the plaintiff's business or property has suffered because of the acts of the defendants?
>
> "ANSWER: $35,000." R. 223.

There was substantial evidence to support this finding, and it must stand. *Flintkote Co. v. Lysfjord, supra,* relied on by appellants, is not controlling. In that case there were no data on which the jury could base its estimate, no business history, and no comparison with a competitor. 264 F. 2d at 391-394. None of these deficiencies is present here. Plaintiff sought no future profits, but only compensation for three past seasons in which it was clearly injured. There was strong evidence of loss of specific blocks of business and of further losses which were approximated on the basis of extensive experience in the industry. The figures were supported by comparison with the revenues of the only two comparable competitors. The evidence is well within the requirements established by this Court in *Richfield Oil Corp. v Karseal Corp.,* 271 F. 2d 709, 713-15, equating "the just and reasonable estimate of damage to the just and reasonable verdict the jury must render in a personal injury case." When the jury is properly instructed as here, its determination of the amount of damages is conclusive. *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U.S. 359, 379, 71 L. Ed. 684, 691.

INTERSTATE COMMERCE

(Answering Appellants' Points 4 and 5, Br. 47-48, 74-102)

Here again appellants attempt to re-argue a fact issue which was decided adversely to them in the trial court. The question of whether a conspiracy restrains or affects interstate commerce so as to invoke federal antitrust jurisdiction is for the jury under proper instructions. *Marks Food Corp. v. Barbara Ann Baking Co.,* 274 F. 2d 934 (9th Cir. 1960); *Sunkisk Growers, Inc. v. Winckler & Smith Citrus*

Prod. Co., 284 F. 2d 1, 24 (9th Cir. 1960), rev'd on other grds., 370 U.S. 19, 8 L. Ed. 2d 305; reh. den. 370 U.S. 965, 8 L. Ed. 834.

Congress, in passing the Sherman Act, "left no area of its constitutional power unoccupied." *United States v. Frankfort Distilleries,* 324 U.S. 293, 89 L. Ed. 951 (1945). It exercised its full power over interstate commerce, so that the Act extends both to transactions in the stream of commerce and to local transactions which substantially affect interstate commerce. *United States v. Employing Plasters Ass'n.,* 347 U.S. 186, 98L.Ed. 618 (1954); *United States v. Women's Sports Wear Manufacturers Ass'n.,* 336 U.S. 460, 93 L.Ed. 805 (1949). Whether intrastate activities affect interstate commerce "is a question of fact." *Las Vegas Merchant Plumbers Ass'n. v. United States,* 210 F. 2d 732 (9th Cir. 1954), cert. den., 348 U.S. 817, 99 L.Ed. 645.

One injured by a conspiracy which affects commerce may recover treble damages even though he is not directly involved in the interstate commerce which has been affected. *Mandeville Island Farms, Inc. v. Amercian Crystal Sugar Co.,* 334 U.S. 219, 92 L.Ed. 1328 (1948). Thus, the plaintiff need not be himself engaged in interstate commerce at all; he has standing if injured by a conspiracy which, in one or more of its aspects, affects commerce. *Bailian Ice Cream Co. v. Arden Farms Co.,* 104 F. Supp. 796 (S.D. Cal. 1952), aff'd, 231 F. 2d 356 (9th Cir. 1955), cert. den., 350 U.S. 991, 100 L.Ed. 856.

A qualitative, rather than a quantitative, test is applied in determining whether interstate commerce has been substantially affected. *Las Vegas Merchant Plumbers Ass'n. v. United States, supra.* The test is not the quantity involved, nor a diminution of the total trade, but only whether the conduct

alleged has a substantial effect on some part of interstate commerce. *Fashion Originators Guild, Inc. v. Federal Trade Comm'n.,* 312 U.S. 457, 85 L.Ed. 949 (1941); *United States v. Women's Sportswear Manufacturers Ass'n.,* 336 U.S. 460, 93 L.Ed. 805 (1949).

The trial court here instructed the jury that the burden was on plaintiff to prove the alleged violations substantially affected commerce; that the operation of a bowling alley, without more, is an intrastate activity, but that local businesses making substantial use of the channels of interstate commerce assume an interstate aspect; and that the amount of commerce affected must be "more than insignificant." Tr. 2775-77.

Effects on Interstate Commerce Portion of Plaintiff's Business

Under these instructions the jury returned two special verdicts finding that the conspiracy substantially affected interstate commerce. The evidence was clear, *supra,* that bowling is a large industry involving millions of dollars in transactions, including interstate transactions, each year. The minimum equipment rental payments made by Washington State customers to AMF in New York each year exceed one million dollars, and AMF represents only about half of the market. Tr. 271-273. AMF's business fluctuates with the number of bowling lanes in operation and the volume of business done by each proprietor who leases pinspotting equipment. Tr. 274. The first special verdict of the jury on interstate commerce relates to this aspect of the industry. The evidence showed that the loss of bowling lineage inflicted on Pacific Lanes by the conspiracy caused it to pay $9,000 less than it normally would have paid for pinsetter rental to AMF in New

York over the three seasons involved. Tr. 1200-1201. The jury returned the following finding:

> "Do you find, from a preponderance of the evidence, that the acts of the defendants substantially affected the interstate commerce portion of the plaintiff's business, and that this portion affected was also more than an insignificant or insubstantial amount?
>
> "ANSWER: Yes." R. 223.

Whether plaintiff's interstate payments were significant or not was a jury question, and the verdict based on this evidence concludes the issue. *Marks Food Corp. v. Barbara Ann Baking Co., supra; Richfield Oil Corp. v. Karseal Corp., supra.* This finding suffices to support Sherman Act jurisdiction. Almost exactly in point is *United States v. Central States Theatre Corp.,* 187 F. Supp 114, footnote 19 (D. Neb. 1960) where interstate commerce was held sufficiently affected by restraints upon a drive-in movie theatre, since the film rental payments made by the theatre depended directly on the admission charges paid by local customers. As here, a restraint which diminished the admission receipts also reduced the interstate rental payments.

Other Effects of Conspiracy on Commerce

The second interrogatory on this subject concerned the effect of defendants' conspiracy on interstate commerce in general. In arguing this issue appellants, like the defendants in *Jerrold Electronics Corp. v. Wescoast Broadcasting Co.,* 341 F. 2d 653, 663 (9th Cir. 1965), seek to discuss separately each of their acts and argue that it alone does not support the verdict. As in *Jerrold,* this approach fails to cope with what really happened; here, that businessmen controlling most of an in-

dustry combined to restrain and monopolize the entire field. Theirs was a multi-purpose conspiracy which embraced concerted refusals to deal, price maintenance, allocation of markets, and monopolization, and the conspiracy as a whole restrained commerce. Defendants argue as if plaintiff's lost customers must have been interstate travelers for the antitrust laws to apply; such is not the law, as shown by the numerous motion picture exhibitors' cases and others in which plaintiffs have recovered damages for loss of local patronage.

Eligibility Rule

The eligibility rule was one aspect of the conspiracy which directly restrained commerce. Because of it the business of non-member houses other than plaintiff dropped drastically. Tr. 750-51, 792-93, 1083-1095. These declines necessarily reduced the volume of interstate purchases and rentals, and illustrate the rule's effect on non-member houses.

The bowling tournaments themselves are part of interstate commerce. Some are broadcast by interstate television and radio. Tr. 137-138, 147-149, Ex. 261e. Many nationwide tournaments involve state and regional preliminaries. Tr. 143-155.

Bowlers in substantial numbers travel across state and international lines to participate in tournaments, and this commerce was restrained by the conspiracy.

The WSBPA and BPAA gave the Canadian proprietors a series of "deadlines" to join or have their bowlers banned from tournaments in Washington. Exs. 112, 114. When the Canadians did not join by July 1, 1961, their bowlers were declared ineligible. Exs. 133, 134. In the face of this they joined effective January, 1962. Exs. 136, 137, 138.

Many Canadians came into Washington to bowl in tournaments. Grant, manager of Consolidated Bowling Corporation's three large bowling alleys in British Columbia, testified that he personally had seen Canadians in U. S. tournaments numbering "in the thousands." Tr. 1098. Consolidated had 7,242 registered league bowlers in its houses, of whom approximately 20 per cent normally traveled to Washington for tournaments. Tr. 1085-1086. In 1962, 986 bowlers from Vancouver, B.C. alone bowled in the All-Coast Tournament at Vancouver, Washington. Tr. 1087.

Consolidated left the BPA in 1963, and its bowlers became ineligible for U. S. tournaments. Tr. 1091-1092. Grant testified that the eligibility rule affected the traffic of bowlers to the United States, that it is "considerably down," and that bowlers from Consolidated's houses have been rejected from tournaments in this country. Tr. 1097.

Appellants argue that Grant's testimony was inadmissible because it was based in part on records kept by others. But the witness showed extensive personal knowledge as a proprietor (Tr. 1082), as a tournament bowler who had bowled all over the United States (Tr. 1084), and as a former secretary of the City Bowlers Association (Tr. 1103). He based his testimony on his knowledge of his own business, on books and records of Consolidated kept by himself, on his own observation of bowlers, and on records of the City Bowlers Association. Tr. 1084, 1090, 1098. The testimony was admissible under the rule expressed in McCormick on Evidence, § 10 (1954 Ed.), p. 20:

> "And in business or scientific matters when the witness testifies to facts that he knows partly at first hand and partly from reports, the judge, it seems, should admit or exclude

according to his view of the need for and the reasonable reliability of the evidence."

Accord: *Hunt v. Stimson,* 23 F. 2d 447 (3rd Cir. 1928).

Moreover, the only statistic which Grant said came from the City Association records was that there were 5,500 Canadian entries per year in U. S. tournaments. Tr. 1098-1107. The most important part of his testimony—that about 20% of Consolidated's 7,242 league bowlers go to tournaments in Washington—was "a figure derived from our own houses." Tr. 1107-1108. As plaintiff stated in argument (Tr. 2703), this meant that about 1,500 people who would ordinarily cross the border yearly to bowl in tournaments are now barred by the eligibility rule from doing so.

Similar jurisdictional facts were proved by other witnesses whose testimony was not objected to. In 1963 the All-Coast Tournament at Vancouver, Wash., attracted 7,000 bowlers, about 135 to 140 of whom were from Canada. Tr. 2304, 2306. This was in a year when most of the Canadians were disqualified by the eligibility rule. Many fewer Canadians came into Washington for the tournament than in 1960, when Grant said there were 986 from Vancouver alone. Tr. 1087. Beyond this, of the 7,000 bowlers, about 60 per cent, or 4,200 people, came from outside Washington. Tr. 2315. The eligibility rule appeared on the tournament posters and entry blanks, and there was no way to tell how many people stayed away from the tournament who would otherwise have come. Tr. 2316. In the Crosley Mixed Team Tournament in 1964, about a thousand bowlers took part, of whom about 600 came from outside Washington. Tr. 2317-2318.

In all of these situations, the conspiracy not only

reduced the number of bowlers traveling in commerce, but also imposed a *qualitative* restraint: only those bowlers traveled to take part in tournaments who boycotted independent bowling alleys in their home states and elsewhere.

Price Fixing

The court instructed that price fixing violates the Sherman Act only if it affects interstate commerce. Tr. 2774. Not only the fixing of prices at agreed levels is unlawful. Any combination whose purpose and effect is to raise, depress or *stabilize* prices is illegal per se. *United States v. Parke Davis & Co.*, 362 U.S. 29, 4 L.Ed. 2d 505 (1960); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 84 L.Ed. 1129 (1940).

Price stabilization was clearly one aim of defendants' conspiracy here. At the 1957 meeting where the overbuilding committee was formed, the BPAA President spoke of the danger of "price wars upon price wars, and I think the only people in this room who have any control over it are sitting here at this table." Ex. 1. Another BPAA President wrote in the official magazine in 1959:

> "There is no room anywhere in the fabric of proprietor organization for unethical practices, price cutting or under-the-table deals for temporary personal advantage." Ex. 261c.

See also Exs. 22, 51, 65, 74.

In Washington, defendants combined to keep prices where they wanted them. So-called "unfair pricing" was a concern of the overbuilding committee. Tr. 1652, Exs. 31, 35. Price increases were discussed at association meetings. Tr. 2204, 238, 241, 261. Applicants for membership were asked to bring

their prices to the level charged by members. Tr. 235, 422-29. Defendants had a "gentlemen's agreement" to hold prices. Tr. 318-19. Schedules of league prices were adopted at meetings. Tr. 962, 1117-19, 1121. Tacoma prices were generally uniform about two years, beginning about 1960. Tr. 258-59, 1008. The Southwest Washington BPA Code of Ethics fixed prices for spare practice at $1.00 per man. Ex. 262.

Appellants argue that Exhibit 262 was not binding on them. But the SWBPA documents were delivered by an association representative with the WSBPA application form and code of ethics; defendant Kulm was an officer of both WSBPA and SWBPA and knew of the latter's express price-fixing provision; and the exhibit was admitted without objection and without restriction. Tr. 798, 2265-66.

Appellants also argue that the testimony of Hoffman and Stevenson was incompetent. The short answer to this is that appellants made no objection to the testimony below and cannot now argue that it should have been excluded. *Williams v. Union Pacific R.R.,* 286 F. 2d 50 (9th Cir. 1960). Moreover, appellants rely on the doctrine of *in pari delicto,* which does not apply in antitrust cases. *Keifer-Stewart v. Jos. Seagram & Sons,* 340 U.S. 211, 95 L.Ed. 219 (1951). Even the testimony of a co-conspirator is competent. *Pittsburgh Plate Glass Co. v. United States,* 260 F. 2d 397 (4th Cir. 1958) *aff'd.,* 360 U.S. 395, 3 L.Ed. 2d 1323 (1959); *Colt v. United States,* 160 F. 2d 650 (5th Cir. 1947). And here essentially the same facts were proved by other witnesses.

Trade associations like the BPAA are interstate instrumentalities even though they are not "en-

gaged in any commerce in the sense of being a trader or shipper . . ." *Chamber of Commerce of Minneapolis v. Federal Trade Comm'n.*, 13 F. 2d 673 (8th Cir. 1926); *Quality Bakers of Amer. v. Federal Trade Comm'n.*, 114 F. 2d 393 (1st Cir. 1940). The use of an interstate instrumentality, or the use of local acts by a business engaged in interstate commerce, to restrain local trade violates the antitrust laws. *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 99 L.Ed. 145 (1954).

Here defendants and their co-conspirators used the BPAA, an interstate instrumentality, to artificially stabilize prices and otherwise restrain the commerce of bowling alleys. This invokes jurisdiction.

"Overbuilding" Activities

Defendants make the amazing statement that the overbuilding committee "was fully in accord with the right of any person to invest in any trade or business." Br. 96. This is belied by the committee's own correspondence: "They feel that unless they saturate the district themselves that very shortly someone else will find ways and means of going into business in the area." Ex. 34. See also Exs. 7 and 26.

The overbuilding committees directly restrained commerce by preventing the construction of new bowling alleys and, hence, the interstate sales of the equipment and materials to get them started. Secoma Lanes, after the overbuilding committee wrote to AMF and Brunswick, was unable to get equipment at all for many months and was therefore unable to open as scheduled. Ex. 34, Tr. 1824-1832. A 24-lane house, Secoma's interstate outlay for lanes and pinsetters alone would have been $322,800 at the rates charged by AMF. Tr. 270-271. The

Washington committee wrote that it believed it had been "successful in some cases in eliminating or discouraging new operations." Ex. 26. See also Tr. 1627, 1682, Ex. 31.

Nationally, in 1957 the BPAA overbuilding committee asked AMF "to demand high down payments in critical areas, as determined by the BPAA listing. AMF agreed that not less than a 25 per cent down payment would be accepted, and that there would be no exceptions." Ex. 3. In 1958 the committee reported that the manufacturers "said they would stiffen credit terms and that they would tone down their proposals to new prospects . . ." Ex. 5. In 1958 it reported that AMF and Brunswick had decided to stop building for six months in the Miami area. Ex. 20. The 1959 overbuilding committee report referred to "a moratorium in Florida and a few turndowns in Detroit", while complaining about the difficulty of attaining "our goal to protect our business from price wars, boycotts, and similar evils . . ." Ex. 21.

Defendants appear to concede that their anti-"overbuilding" efforts restrained commerce, but seek to segregate their activities by arguing that "However interstate in nature the overbuilding activities may have been does not serve as the basis for inferring that the [eligibility] rule had the requisite effect on interstate commerce." Br. 102. But the evidence clearly showed that overbuilding and the eligibility rule—together with p r i c e maintenance, allocations of markets, and exclusion of competitors—were all part of the same conspiracy. Defendants' codes of ethics, Exs. 59, 264, prohibited solicitation or acceptance of business from customers of fellow members, condemned "special inducements" such as merchandise, and agreed to

reject from tournaments all persons who bowled in a league in a non-member house. Defendant Isaacson inquired of an affiliated association in 1959: "Has the Code of Ethics proved valuable in combatting the overbuilding problem?" Ex. 48. Association officials told Loveless the eligibility rule was developed to protect the proprietors, since the "overbuilding" situation could make the business not profitable. Tr. 740-741, 743.

The overbuilding committee wrote in March, 1959 about preparing written materials which members would show to anyone who expressed interest in entering the bowling business:

> "The message that we have in mind should read something like this: '. . . if a non-member is not accepted into the W.S.B.P.A., there are certain services and privileges which he will not receive . . . Eligibility to BPAA All-Star eliminations in all categories, individual, team, doubles, handicap team, etc. is available only to bowlers bowling exclusively in BPAA houses. In Washington state all members of the W.S.B.P.A. post the following message: [quoting rule requiring bowlers to do all their league bowling in member houses] . . .'
>
> *"It is the belief of your O.B.C. that only by working together and enforcing in every manner possible the rules of our association can we be effective in discouraging overcrowding of the bowling field which can easily lead to unfair pirating of leagues and employees. Overbuilding also lends itself to many other dangerous practices such as offering bonuses and premiums and other forms of unfair pricing."* Ex. 35. (Emphasis added.)

This plan was followed up by defendants, who told would-be proprietors they would be faced with adverse recommendations to the membership com-

mittee. Exs. 44, 45. Aberdeen and Lacey Lanes were denied membership because they were owned by the Loveless brothers, who also owned Secoma Lanes, a house disapproved by the overbuilding committee. Tr. 734-736, 746, 748. As a result they lost business because of the eligibility rule. Tr. 750.

Defendants rely heavily on *Lieberthal v. North Country Lanes,* Inc., 332 F.2d 269 (2nd Cir. 1964). But as the District Judge noted in his memorandum decision, that case is factually different from the present case. R. 233, Appendix D, *infra.* In *Lieberthal* the plaintiff alleged only a restraint of intrastate activities, the one bowling alley involved had never been built, and there were no allegations of multi-state activities or of impact on the interstate trade of other parties. Plaintiff here alleged a nationwide conspiracy and the involvement of interstate commerce in a variety of ways, and the trial court, guided by *Marks Food Corp. v. Barbara Ann Baking Co.,* 274 F.2d 934 (9th Cir. 1960) and *Monument Bowl, Inc. v. Northern Calif. Bowling Prop. Ass'n.,* 316 F.2d 787 (9th Cir. 1963), received evidence on the subject and submitted the issue to the jury, which returned to following special verdict:

> "Do you find, from a preponderance of the evidence, that the acts of the defendants substantially affected interstate commerce, and that the amount of commerce thus affected was not insubstantial or insignificant?
> "ANSWER: Yes." R. 223.

This finding is supported by substantial evidence, and settles the jurisdictional issue.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

WILLIAM L. DWYER
Attorney for Appellee

November 15, 1965

APPENDIX A

Index to Court's Instructions

APPENDIX B

DAMAGES BASED ON PLAINTIFF'S EVIDENCE OF LOST LEAGUES AND OTHER INCOME

League and Tournament	Net Loss
1961-62—	
City Tournament	$ 2,408.93
Invitational League	1,731.84
1962-63—	
Invitational League	1,731.84
Women's Invitational League	1,731.84
Tacoma Commercial League	1,731.84
Plywood League	1,231.88
1963-64—	
Invitational League	1,797.12
Women's Invitational League	1,797.12
Olympic League	2,164.80
Plywood League	1,284.10
Sub-total	$17,611.31
Open Play, Day League, and Other—	
1961 - 62	10,834.56
1962 - 63	10,834.56
1963 - 64	10,834.56
Sub-total	$32,503.68
TOTAL NET LOSS	$50,114.99

(The net loss computed by this method is greater than the damages found by the jury.)

DAMAGES BASED ON COMPARATIVE STANDARDIZED NET INCOME PER DEFENDANTS' FIGURES

Return to owner, Bowlero, 1961-1963	$119,486.00
Return to owner, New Frontier, 1961-1963	63,948.00
Total	183,434.00
Average return to owner, Bowlero and New Frontier, 1961-1963	91,717.00
Return to owner, Pacific Lanes, 1961-1963	(55,296.00)
NET LOSS (difference between plaintiff's net return and average of two defendant competitors)	$36,421.00

(The net loss computed by this method is greater than the damages found by the jury.)

DAMAGES BASED ON COMPARATIVE BOWLING LINEAGE

	1962	1963
Pacific Lanes—lineage keeping pace with three-house average	568,923	515,320
Pacific Lanes—actual lineage	482,277	471,586
Decrease	86,646	43,734
TWO-YEAR LINEAGE LOSS		130,380
THREE-YEAR LINEAGE LOSS PER EX. 259		118,290

(The net loss computed by this method is greater than the damages found by the jury.)

APPENDIX C

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiffs, vs. SANTA CLARA VALLEY BOWLING PROPRIETORS' ASSOCIATION, a corporation, and NORTHERN CALIFORNIA BOWLING PROPRIETORS' ASSOCIATION, a corporation, Defendants.	No. 125346

* * *

CONCLUSIONS OF LAW

CONCLUSION OF LAW NO. 1

The Court has jurisdiction of the plaintiff and defendants and of the subject matter of this action.

CONCLUSION OF LAW NO. 2

The defendant, Santa Clara Association, a non-profit corporation, violated Section 16720 and 16726 of the Business and Professions Code of California in the following particulars:

(a) It increased and set the prices to be charged for bowling in Santa Clara County, California;

(b) It in one instance conspired to rig bids for public school bowling activities;

(c) It conspired with defendant Northern Asso-

ciation in unreasonable restraint of trade and to prevent competition in bowling in violation of sections 16720 and 16726 of the Business and Professions Code in adopting and enforcing a code of ethics provision and rules and regulations prohibiiting its members from offering or giving bowlers or leagues of bowlers competitive inducements, services or things of value of [*sic*] the purpose of stabilizing and maintaining prices within the industry.

(d) It enforced the 1960 national tournament eligibility rule of BPAA.

CONCLUSION OF LAW NO. 3

The defendant Northern Association violated Sections 16720 and 16726 of the Business and Professions Code of the State of California in the following particulars:

(a) It adopted and enforced a code of ethics provision and rules and regulations prohibiting its affiliates and members from offering or giving bowlers or leagues of bowlers competitive inducements, services, or things of value;

(b) It adopted the February 1960 Northern Association tournament eligibility rule;

(c) It adopted and enforced the 1960 national tournament eligibility rule of BPAA.

(d) It prohibited any member from advertising or giving any publicity in its establiishment to any local house tournament which had not been sanctioned by the Northern Association.

CONCLUSION OF LAW NO. 4

The tournament eligibility rule adopted by the defendant Northern Association on or about July

14, 1961 does not violate sections 16720 or 16726 of the Business and Professions Code of the State of California, and does not violate the Cartwright Act of the State of California.

CONCLUSION OF LAW NO. 5

Defendants Santa Clara Association, Northern Association, Co-conspirator BPAA, and the bowling proprietor members of said associations by the adoption and application of the BPAA eligibility rule combined, conspired and entered into agreements in unreasonable restraint of trade and to prevent competition in bowling in violation of sections 16720 and 16726 of the Business and Professions Code of California.

CONCLUSION OF LAW NO. 6

The BPAA tournament eligibility rule requiring bowlers to confine their league bowling exclusively to BPAA member establishments and the BPAA and Northern Association rules which required bowlers to confine their league, tournament and advertised exhibition bowling exclusively to BPAA member establishments each constituted a concerted refusal by BPAA members to deal with bowlers who patronized non-BPAA member competitors and a group boycott of such bowlers, a secondary boycott and agreement to coerce bowlers to not deal with non-BPAA members, a tying arrangement which tied and conditioned the sale of participation in proprietor tournaments upon the purchase from a BPAA member establishment of a bowler's entire requirement of league (or league, tournament and advertised exhibition) bowling, an unreasonable restraint upon trade and commerce, and a trust,

against public policy and void, in violation of sections 16720 and 16726 of the Business and Professions Code of California.

CONCLUSION OF LAW NO. 7

The Court concludes in all respects as set forth in the foregoing Findings of Fact.

Dated this 15th day of January, 1964.

Edwin J. Owens
Judge of the Superior Court

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

PACIFIC LANES, INC., Plaintiff, vs. WASHINGTON STATE BOWLING PROPRIETORS' ASSOCIATION, a corporation, *et al.*, Defendants.	**Civil Action No. 5381** **MEMORANDUM DECISION**

The above-entitled cause is now before the court upon defendants' motion for judgment notwithstanding the verdict or in the alternative for a new trial and also upon plaintiff's motion for an award of reasonable attorneys' fees in the amount of $30,000.

Defendants have not separately stated the grounds upon which their motion for judgment notwithstanding the verdict is based. However, it appears that of the fifteen allegations of error points numbered 1, 10 and 13 relate to this issue and the remaining twelve are in support of defendants' motion for new trial. Points 1, 10 and 13 will be discussed first.

The first ground of error is:

> "There was no evidence, or any reasonable inference from evidence, that plaintiff and defendants were engaged in interstate commerce or that any restraint with which defendants were charged substantially affected interstate

commerce within the meanings of Sections 1 and 2 of the Sherman Act."

Grounds 10 and 13, in substance, are that the court should have ruled as a matter of law that no substantial effect upon interstate commerce existed; that the question should not have been submitted to the jury; and that the issue was one of jurisdiction which is always to be ruled upon by the court. For support, the defendants rely upon *Lieberthal v. North Country Lanes, Inc.*, 221 F. Supp. 685, affirmed 332 F.2d 269 (2 Cir. 1964).

The court has given thoughtful attention to the *Lieberthal* case and has declined to follow it for two reasons. First, because *Lieberthal* is factually different from the present case; and second, because I feel our circuit has different views than the second circuit with respect to certain crucial points.

In the *Lieberthal* case the bowling alley had not yet begun operation. It had been built but not equipped. At that point the lease was cancelled by the defendant because, as alleged by plaintiff, of a conspiracy in restraint of trade. There was a provision in the lease which provided for cancellation by the defendant. The plaintiff alleged that the flow of equipment and supplies to the new alley constituted interstate commerce and that there would be interstate solicitation of bowlers once the alley commenced business. The district court found that the installation of equipment was a "one shot" affair, and the further flow of supplies to the alley would be too insignificant to put it into the stream of interstate commerce. Furthermore, the plaintiff did not allege a restraint in the interstate activities of the defendant, only a restraint in the intrastate ones. On this basis the second circuit affirmed.

In the case at bar the plaintiff had an established, thriving business. He alleged that interstate restraints were directly affecting that business and that the amount was substantial. And he alleged that the interstate restraints were tending towards a monopoly of the bowling business in the State of Washington. The specific effect of the alleged restraints was a reduced capacity to participate in tournaments and to draw out-of-state bowlers to tournaments, a reduction of the interstate rental payments which were substantial and continuous, and a reduced amount of incidental purchases of bowling supplies such as shoes, balls, and pins. These allegations of fact, in my opinion, were enough to cast doubt upon the applicability of *Lieberthal* to the Pacific Lanes' situation.

Secondly, our circuit has recently ruled upon a case where the factual situation is the twin of the one at bar—*Monument Bowl, Inc. v. Northern Calif. Bowling Prop. Ass'n.,* 197 F. Supp. 208 (N.D. Calif. 1961), reversed 316 F.2d 787. While that case only decided upon the advisability of permitting a motion to amend a complaint it does give some guidance in this situation. In *Monument Bowl* the district judge dismissed the complaint because the plantiffs had failed to allege a restraint of "commerce among the several states." The plaintiff made no such error here. Furthermore, the district judge was not inclined to permit amendment. He felt the complaint contained such "inherent frailties" that an amendment could not cure them. Our court of appeals reversed. Quoting *United States v. Hougham* (1960) 364 U.S. 310, the court said:

> " 'If the underlying facts or circumstances relied upon by a plaintiff *may be* a proper sub-

> ject of relief, he ought to be afforded an opportunity to test his claim on the merits.' " (Emphasis added.)

I confess to having harbored the same doubts as did the district judge in *Monument Bowl.* Judging solely by the complaint the interstate commerce involved here appeared negligible. However, as I read *Monument Bowl* the decisional tenor of our circuit counsels patience and urges inquiry into the facts. Summary dismissals are not favored. Only after the evidence is in, when it is apparent the plaintiff cannot recover, is it proper to dismiss the action. The plaintiff in the present case pleaded jurisdictional facts. Jurisdiction depends upon facts pleaded—not facts proved. The court was therefore constrained to closet any motion to dismiss based upon jurisdiction until proof upon this issue was adduced. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.,* (1951) 341 U.S. 246, 249. Even if the parties had agreed to try the issue of jurisdiction separately (which they had not) the result would be the same. The over-all merits of the case and the facts relevant to jurisdiction were intermingled. They were so intermingled that the most sensible and expeditious way to dispose of the case was by trial. Fortunately, the court was able to find a case from our circuit which further supported its decision to try the case. The holding of *Marks Food Corporation v. Barbara Ann Baking Co.,* (9 Cir. 1960) 274 F.2d 934, is situationally in point. The court there stated:

> "It seems to us that a safe practice would be never to separate the subject matter jurisdiction issue for separate trial in cases where the factual merits of the case must be considered in deciding the separated issue."

This is precisely what the court would have had to do—consider the factual merits of the claim in deciding the jurisdictional issue. Once the evidence had come in I was unable to say, as a matter of law, that the connection of the parties with interstate commerce was "insignificant and insubstantial." The jury being the trier of facts, it fell to them, after proper instruction, to decide this question. In response to specific interrogatories, the jury found that the amount of interstate commerce affected was not "insubstantial or insignificant," settling the jurisdictional question.

Under the law in the ninth circuit, as I interpret it, and the evidence as adduced in this case the questions with respect to impact on interstate commerce, restraint of trade and monopoliation were issues for consideration and determination by the jury and the motion for judgment notwithstanding the verdict will be denied.

The remaining specifications of error set forth in defendants' motion relate to alleged grounds justifying or requiring a new trial.

For their second, third and fourth grounds of error the defendants claim that the court committed prejudicial error in giving an instruction on group boycotts and in failing to give certain requested instructions of the defendants. These omitted requests were numbered 23, 27 and 29.

Unquestionably, it is the duty of the court to give a correct requested instruction. On the other hand, it is Hornbook law that the court is not required to give, as requested, instructions which need explanation, modification or qualification, C.J.S., Trials § 408.

Regarding the group boycott instruction, the defendants do not contend that it is an incorrect state-

ment of the law. The claimed error is that in failing to give requests 23, 27 and 29 the group boycott instruction by itself was "misleading," and its "misleading" effect could only be overcome by "balancing" with the defendants' requests.

Throughout the trial there was an abundance of evidence that the defendants had combined and refused to sanction any bowler for tournament play unless he did his bowling exclusively in an Association establishment. In the complaint the plaintiff had specifically alleged a violation of the Clayton Act provision relating to tying agreements; the plaintiff specifically alleged a group boycott with the purpose of establishing a monopoly (complaint pp. 7, 5 and 6).

Furthermore, the plaintiff introduced voluminous evidence of meetings, writings, statements, and actions on the part of the individual defendants and the Association which tended to show that their combined aim was the exclusion of competition. The tendency and necessary effect of such an exclusion is a restraint of trade. In view of all this evidence, from the witnesses of both parties, it seems to me that it would have been plain error *not* to give a group boycott instruction.

Defendants' theory in response to these allegations seemed to be that past abuses in the sport of bowling had necessitated the formation of the Association "to promote, and protect the sport of bowling." *Fashion Originators' Guild v. Federal Trade Commission* (1941) 312 U.S. 457, shows clearly that there are limitations upon the powers of an association to restrict even abuses which are admittedly unfair. Furthermore, trade associations, because of their obvious temptations to concerted action, are closely scrutinized by the courts and the adminis-

trative agencies. See generally, *Fashion Originators' Guild v. Federal Trade Commission,* supra; *Federal Trade Commission v. Cement Institute,* (1948) 333 U.S. 683; *Associated Press v. United States* (1945) 326 U.S. 1; *Christiansen v. Mechanical Contractors Bid Depository* (D. Utah 1964) 230 F. Supp. 186. Associations may be formed and may operate, but they have a perimeter that has been judicially described. If the defendants wished to have the jury instructed upon the rule-making power of an association it was the defendants' duty to submit an instruction which clearly and accurately outlined the limits of the perimeter.

The following are the requests submitted by the defendants on this issue:

No. 23:

> "Defendants have the right to adopt and enforce rules and regulations in order to regulate, standardize, and promote competition in the sport of bowling, and such regulations are not unlawful even though an incidental effect may be to restrict the business of the plaintiff. *United States v. West Trotting Association,* 1960 Trade Cases, Para. 69, 761 (SD.Ohio, 1960) *United States v. Bakersfield Associated Plumbinng Contractors, Inc.,* 1958 Trade Cases, Para. 69, 087."

No. 27:

> "If you find that the main purpose and chief effect of the eligibility rule and its enforcement is to foster the bowling business by the promotion of standardized rules and regulations regarding participation in tournaments without any unlawful intent to monopolize or restrict trade, then even though such rules or regulations incidentally restricted competition and interstate commerce, such acts do not con-

stitute a monopoly or attempted monopoly in violation of the antitrust statutes of the United States.
Whitwell v. Continental Tobacco Co., 125 F. 454."

No. 29:

"An association composed of members involved in the same business or calling may make reasonable rules and regulations and may impose sanctions upon such members for a violation of said rules, including fines and expulsion of such members for a violation of rules. Such acts and practices are not unlawful.
U.S. v. Southern Wholesale Growers Association, 207 F. 434."

Regarding number 23, this instruction appears to be questionable on its face. I have always supposed that no organization, other than Congress or bodies authorized by Congress, have the "right to adopt and enforce rules and regulations in order to regulate * * * competition in the sport of bowling," unless the bowling activities are wholly intrastate. To hold otherwise would be to allow businessmen to regulate themselves and would trench upon the authority of the courts and administrative bodies. See *Fashion Originators Guild v. Federal Trade Commission,* supra. The requested instruction further implies a policy which is antagonistic to the purpose of the antitrust laws. That purpose is to promote the free and unrestricted interplay of competition. Defendants' request would indicate that businessmen may regulate competition as they please, so long as their avowed purpose is a salutary one.

Additionally it should be noted that the facts in *United States v. West Trotting Association* (correct citation is "United States Trotting Association")

were materially different from the facts at bar. There the government moved for summary judgment on the ground that the rules of the trotting association were unlawful *per se*. The court held that the association rules were not unlawful *per se*. Both parties agreed that they had no further proof to offer, and the court therefore made a statement of factual findings. The ones applicable to this case are as follows:

1. USTA had never denied track membership to any application for a five-year period prior to the complaint.

2. The plaintiff failed to establish that the main purpose of the association and its rules was different from its stated purpose of providing a *voluntary association open to all those interested in the betterment of harness racing*. (Emphasis added.)

3. Since USTA admitted all those interested in racing, there was no monopoly.

4. Out of 10,709 applications for individual membership, only 6 were rejected. The rejections were for infractions such as race fixing, and one rejectant had a long list of gambling convictions.

5. All of the rules and regulations were adopted to meet undisputed evils which had previously occurred in racing.

6. The eligibility certificates for each horse were $2 and were issued only to members in good standing.

7. There were only 31 horses and owners under suspension, out of all those registered, and the suspensions had been given for such offenses such as (a) failing to pay entry fees; (b) bad checks; and (c) forging mating certificates.

8. USTA functions in subordination to all state laws, and this is stated specifically in its charter.

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8. USTA functions in subordination to all state laws, and this is stated specifically in its charter.

9. One rule of the USTA was that horses which were not members of the USTA were barred from participating in any race except a "free for all," which was limited to horses that had won over $50,000. However, USTA had never in fact denied any eligibility certificate under this rule (Rule 5, § 1.).

10. USTA takes no direct part in the management of any race meeting.

Contrast this with the situation in Pacific Lanes. Here, testimony, documents, and admissions—tacit and otherwise—clearly permitted the inference that the true purpose of the association was two-fold: to promote bowling in the Tacoma area, and to do so by impeding the competitive effectiveness of the "independent" bowling proprietors. The evidence indicated that the Association accomplished the latter of its twin purposes by concerted pressure, by denying applications for "eligibility certificates," and making the forms abstruse and difficult to fill out. The Association did not admit all those interested in bowling. In practice, it only admitted the larger, newer establishments. The dues were high, possibly by design, so that the smaller, older houses could not afford the price of the Association. The evidence will sustain a finding that the "evils" which the Association has supposedly been formed to combat were of doubtful existence. "Sandbagging," or deliberately bowling below one's capacity, was one of the claimed abuses which required the formation of the Association. However, many of the witnesses claimed that they had never heard of any instances of this practice, or of "rigging" or of the other infractions claimed by the defendant to be threatening the competitive health of the bowling industry.

On the other hand, the existence of the Over-

building Committee, and its attempts to restrict the construction of new bowling facilities, was further evidence that the chief "abuse" concerning the Association may have been only that of stiff competition among bowling houses rather than unfair practices on the part of competitors in the sport of bowling, as they claimed. All of these factors, when taken together were strong indications that a dominant theme in the Association's existence was the curtailment of competition. Finally, the crucial difference between the *Trotting* case and the case at bar is that USTA took no direct part in the managment of any race meeting. This is telling evidence of the good faith of USTA; their only profit was the general betterment of the sport. With the members of the Bowling Proprietors' Association, however, the facts are reversed. The Association promoted, and its members received a direct, financial benefit from the tournaments sponsored by the BPAA.

Based upon the *Trotting* case, the defendants' request should have contained standards for judging whether the rules adopted by the BPAA were reasonable in light of the evidence. Some of these might have been:

(a) Whether the Proprietors' Association was open to all;

(b) Whether the dues were reasonable;

(c) Whether the proprietors had any financial interest in the tournaments;

(d) Whether the rules were a reasonable approach to the correction of the alleged abuses; and

(e) Whether it is reasonable to suspend a member for any violation other than one which involves fraud or a failure to keep the

equipment maintained according to an objective standard.

None of the above standards were included in request 23; nor was there any statement in this request regarding the scope or effect of the organization's rule-making power in the event there was an underlying conspiracy, which the jury later found existed. Therefore, by the *ratio decidendi* of this case the defendants' request is an inadequate statement of the law in view of the proof presented at trial.

In the defendants' request 23 there was no explanation of the effect that collusion would have on the "reasonableness" of the rules adopted.

The evidence tending to prove unfair practices on the part of the defendants also nullifies *Bakersfield* as authority for the defendants' request, for the same reasons discussed regarding the *Trotting* case.

Defendants' requested instruction 23 was discussed in the conference on instructions, but it was rejected as written (pp. 28, 29, Transcript of Proceedings December 24, 1964 at 10:00 a.m.). At the time I considered using certain of defendants' requests to balance the plaintiff's request on group boycotts. However, the cases cited in support of the defendants' request did not support the language of the proposed instruction when taken in conjunction with the evidence of the case. The request as submitted was therefore refused. Thereafter no rewritten request was submitted.

Proceeding to defendants' request 27, it is my opinion that it is an incomplete statement of the law as it stands today. The cited authority for this case is a 1903 eighth circuit case. A few years after

this decision the Clayton Act was passed, and Judge Medina in *Dictograph Products v. Federal Trade Commission* (2 Cir. 1954) 217 F.2d 821, was of the opinion that the Clayton Act (with its specific proscription to tying arrangements and the "may be" test) was passed to overrule this decision. As authority for such an instruction *Whitwell* is therefore seriously in question. Moreover, the instruction is incomplete in that it does not explain the course for the jury if the incidental effect is one that "may be to substantially lessen competition." This is precisely why group boycotts are illegal.

Considering next defendants' requested instruction number 29, the cited authority in support is a 1913 district court case from the fifth circuit. While the age of a case is not necessarily an infirmity it invokes an attitude of caution, especially in a field of law subject to fairly rapid developments. I believe it was Justice Holmes who said that the maximum precedent-life of a case was twenty years; and he was talking about Supreme Court cases. As with the *Whitwell* case, the Clayton Act and the Federal Trade Commission Act were both passed after this decision. Both acts have had a profound effect upon trade associations and their conduct. Moreover, *Southern Wholesale Grocers* has only been cited once by a higher court (in 1925) during its sixty or so years of existence. All these were circumstances for consideration in deciding whether to add still more to the voluminous instructions which the jury were to receive.

Request 29 is also, in my opinion, misleading. It implies that business men may freely band together, make rules among themselves and impose appropriate sanctions to enforce those rules. Since there is nothing in the request to the contrary the wording

infers a perfect freedom of association and rule-making power, including, presumably, the power to make rules affecting competition. This is not the law. A similar argument of unlimited association was urged upon the Supreme Court in *Associated Press v. United States* (1945) 326 U.S. 1, 15. The court there stated:

> "The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete."

The defendants' request would appear to lead the jury to a different opinion of what the law is. Being an incomplete statement of the law, the defendants' request 29 was rejected.

There is one final comment which runs to all three of the requests—they are essentially arguments. Underlying each of the requests is the question of intent and effect. Associations may make rules and regulations providing their intent, effect, and tendency is not restrictive. The questions of intent and restraint were treated at length in the instructions (pages 18, 23 and 25 of the instructions). These requests of the defendants are primarily a response, showing motivations, to the charge of restraint and monopolization. Counsel for defendants could have and, as I recall, did argue to the jury what the various reasons were behind the actions of the bowling associations. The purpose of instructions is to expound the law and not present argument. It is the duty of counsel to argue the case.

Defendants' fifth ground of error is that the court should have instructed the jury that the plain-

tiff was not entitled to recover for a violation of the antitrust laws in general. The jury was instructed according to the test in *Page v. Work* (1961) 290 F.2d 323; the jury was told that the plaintiff could recover only if the interstate restraint affected his business.

Defendants' sixth ground of error is the failure of the court to instruct the jury (requested instruction number 33) that harm to the general public is an essential element. The short answer to this contention is that the jury found defendants violated both Sections 1 and 2 of the Sherman Act. The Supreme Court in *Klor's, Inc. v. Broadway - Hale Stores, Inc.,* (1959) 359 U.S. 207, 211, in commenting on violation of said sections of the law, stated (referring to an earlier decision):

> "As to these classes of restraints * * * Congress had determined its own criteria of public harm and it was not for the courts to decide whether in an individual case injury had actually occurred."

For this reason the defendants' request was refused.

Defendants' seventh ground of error is the failure of the court to give their request number 34. This request was subject to the same objection noted with respect to request number 33. It pointed out to the jury that if plaintiff's competition was only with other bowling proprietors in the State of Washington there was no injury within the purview of the Sherman Act. It is the nature of the restraint which determines jurisdiction under the Sherman Act, not the identity of the competitor. See *Broadway-Hale,* supra. The defendants' request was properly refused.

Defendants' eight ground of error is the court's failure to give requested instruction number 11,

stating that if the same goods were purchased within the State of Washington, and the same amount of bowling business was conducted within the State of Washington, there would be no effect upon interstate commerce. Our circuit has ruled that the test of an effect upon interstate commerce is qualitative, not quantitative. See *Las Vegas Merchant Plumbers Association v United States* (9 Cir. 1954) 210 F.2d 732. Therefore, if the defendants' actions had only a distortionary effect—and not necessarily a diminishing one—their conduct would still be subject to the sanctions of the antitrust laws. The requested instruction did not correctly state the applicable law.

Defendants' ninth allegation of error complains of a comment contained in the court's instructions with respect to the size or area subject to monopolization, as follows:

> "Combination that affects trade in one city or even a part of a city may violate the antitrust laws."

It is my view that the evidence fully justified the statement and that the comment—if it be considered such—was applicable under the facts of the case.

The remaining allegations of error need but brief comment. Numbers 10 and 13 were dealt with at length at the beginning of this memorandum.

The alleged error numbered 11 relates to the ruling not permitting certain exhibits used by defendants' expert witnesses in support of their testimony to go to the jury. This could not have been prejudicial. The exhibits were illustrative only and the true evidence was the opinion of the expert as to possible damages.

The twelfth alleged error to the effect that the jury was governed by passion and prejudice because

of the allegedly short time spent in deliberation and the size of the verdict is submitted without affidavit or showing of any kind and therefore needs no further consideration.

The contention made by defendants, under the fourteenth ground of their motion, that requested instruction No. 18 as to mitigation of damages should have been given, I believe is without merit for the reason that in the event the jury should find as they did that plaintiff had suffered damage there was no evidence whatsoever tending to prove that plaintiff had not made reasonable efforts to develop open-play bowling.

Likewise, with respect to alleged error No. 15, my view of the evidence supporting the instruction given to the effect that price-fixing constituting a *per se* violation of the Sherman Act is contrary to that expressed by defendants and I therefore reach the conclusion as to this alleged error, as well as to all alleged errors set forth in defendants' motion as grounds for granting a new trial, that no prejudicial error occurred.

ALLOWANCE OF ATTORNEYS' FEES

Plaintiffs having prevailed in this action, an application has been made for an allowance of attorneys' fee as provided by statute in the amount of $30,000. While the testimony of counsel in support of the amount sought as well as the estimate of time spent in preparation and trial would sustain allowance of $30,000, it is my view that the records of plaintiff's counsel with respect to the precise nature of the work done are inadequate. As I stated in a memorandum decision in the case of *Barksdale v. Time Oil Company,* Civil #5638, counsel employed

to initiate antitrust litigation know at the onset of the proceedings that they will request an attorney's fee under the statute if they prevail. The statute, I believe, anticipates that such application be supported by detailed records of time spent and work done. I do not believe the time records as submitted in this case are sufficiently detailed as to service performed to justify an allowance of $30,000. I will allow the sum of $22,500.

An order in accordance herewith may be submitted by counsel for plaintiff.

DATED March 9, 1965.

William J. Lindberg
United States District Judge